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No. 07-948

In The

Supreme Court of the United States

NATIONAL CASUALTY COMPANY,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Petition involves an action in admiralty for a declaratory judgment to determine the existence or scope of coverage under a policy of marine insurance. The insurer filed a complaint in district court and elected to proceed in admiralty without a jury under Rule 9(h) of the Federal Rules of Civil Procedure. The defendant policyholder filed a counterclaim and demanded a jury trial. The district court struck the jury demand, but the Fourth Circuit granted the defendant's petition for a writ of mandamus and directed the district court on remand to try the case before a jury.

Accordingly, the question presented in this Petition is:

When a plaintiff elects, pursuant to Federal Rule of Civil Procedure 9(h), to proceed in admiralty without a jury on a claim that could also have been brought at law, can the defendant nullify that election and impose a jury trial?

PARTIES TO THE PROCEEDING

The petitioner is National Casualty Company, which was the respondent in the case before the United States Court of Appeals for the Fourth Circuit.

The respondent is Lockheed Martin Corporation, which was the petitioner in the case below.

RULE 29.6 DISCLOSURE

All of the stock of National Casualty Company is owned by Nationwide Mutual Insurance Company, which is not a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

National Casualty Company ("National Casualty") petitions for a Writ of Certiorari to review the Opinion and Judgment issued by the United States Court of Appeals for the Fourth Circuit granting the Petition for Writ of Mandamus of Lockheed Martin Corporation ("Lockheed Martin") and directing the United States District Court for the District of Maryland to try this case before a jury.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported at 415 F.Supp.2d 596 (D. Md. 2006) and is reprinted in the Appendix at 21a. The opinion of the United States Court of Appeals for the Fourth Circuit issued on September 27, 2007 is reported at 503 F.3d 351 (4th Cir. 2007) and is reprinted in the Appendix at 1a. The Order of the United States Court of Appeals for the Fourth Circuit issued on October 23, 2007 denying Petitioner's Petition for Rehearing and Rehearing En Banc is not reported but is reprinted in the Appendix at 42a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its Opinion and Judgment granting a writ of mandamus on September 27, 2007, and entered its Order denying rehearing and rehearing en banc on October 23, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend. VII.

Section 9 of the Judiciary Act of 1789, which was enacted on September 24, 1789, the day before the Seventh Amendment was proposed by Congress, provided:

> *That the district courts* shall have, exclusive of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and *shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction*, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from

> the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; (a) *saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it*; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. (b) And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. (c) And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. (d) *And the trial of issues in fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.*

Judiciary Act, ch. XX, § 9, 1 Stat. 73, 76-77 (1789) (emphasis added). This provision now is codified at 28 U.S.C. § 1333(1), which reads:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1333(1).

Rule 9(h) of the Federal Rules of Civil Procedure states:

> **Admiralty and Maritime Claims.** A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

Rule 9(h), Federal Rules of Civil Procedure (2005).

Rule 38(e) of the Federal Rules of Civil Procedure states:

> **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to

> trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 38(e), Federal Rules of Civil Procedure (2005).

INTRODUCTION

This marine insurance coverage dispute raises a pure legal question of admiralty jurisdiction that arises frequently and as to which the circuits are in conflict.

Since 1789, it has been a fundamental principle of admiralty law that, upon the election by a plaintiff to invoke admiralty jurisdiction and its procedures, admiralty and maritime claims will be tried to the court, without a jury. This uniform practice was preserved and continued when the Admiralty Rules were unified with the Federal Rules of Civil Procedure in 1966 by the adoption of Rules 9(h) and 38(e). Pursuant to Rule 9(h), a plaintiff has the right to designate its claim "as an admiralty and maritime claim for the purposes of Rule[] ... 38(e) ... ." The adoption of Rules 9(h) and 38(e) was a recognition that when, prior to 1966, a plaintiff chose to file a claim as to which there was jurisdiction in admiralty and some other basis for federal jurisdiction, the plaintiff had the right to file on the admiralty "side" of federal court. The consequence of this choice was that a jury trial would not be available to either the plaintiff or the defendant, unless Congress had expressly provided otherwise. Rules 9(h) and 38(e) explicitly preserved that practice.

The Fourth Circuit's decision in this case nullifies this choice and allows a defendant to force a jury trial in spite of the admiralty plaintiff's election otherwise. The court below follows decisions of the Eighth and Ninth Circuits in direct conflict with the Fifth Circuit's decision in *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978). In so doing, the Fourth Circuit's holding cannot be squared with this Court's decision in *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847), which held that the Seventh Amendment does not apply to admiralty cases, even when there is concurrent jurisdiction with the law side of the court under the "saving-to-suitors" clause.

The issue is one of recurring importance in the federal courts, as evidenced by the vast majority of numerous district court decisions that side with the Fifth Circuit's authoritative *Harrison* opinion. And this petition raises an optimal vehicle for this Court's resolution of the conflict, because it arises out of a petition for a writ of mandamus by the Fourth Circuit on purely legal grounds; it thus raises a pure question of law without any jurisdictional, factual, or other issues that might impede the Court's resolution of the conflict. This Court's review is therefore warranted.

STATEMENT OF THE CASE

In July 2001, a vessel owned by Lockheed Martin, the M/V SEA SLICE, sustained extensive damage to its hull and machinery in normal seas on the Pacific Ocean approximately 130 miles from Honolulu, Hawaii en route to Anchorage, Alaska. National Casualty conducted its investigation to determine whether

coverage existed and the extent of any covered damage to the vessel. With uncertainty because of incomplete information, National Casualty found probable coverage and in July 2003 adjusted the claim and paid the reasonable cost of repairs as required by the policy. Lockheed Martin objected to the amount of the adjustment and performed its own analysis, making demand for additional payment in May 2005. The parties were thereafter unable to agree on the extent of any covered loss.

To expedite resolution of the dispute, on July 22, 2005, National Casualty filed a complaint for declaratory judgment in the United States District Court for the District of Maryland. The complaint alleged that the district court had jurisdiction over the case under both 28 U.S.C. § 1332, as a civil action between citizens of different states, and 28 U.S.C. § 1333, as an admiralty or maritime action. In the complaint, National Casualty notified the district court and Lockheed Martin that it "elects to bring this action as an admiralty or maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure." After National Casualty filed an amended complaint, in which it again invoked Rule 9(h), Lockheed Martin filed an answer in which it admitted that "diversity jurisdiction and admiralty and maritime jurisdiction exist." It also filed a counterclaim demanding a trial by jury.

National Casualty filed a motion to strike Lockheed Martin's demand for jury trial, and on February 17, 2006, the district court granted National Casualty's motion. App. 21a, 41a; *National Casualty Co. v. Lockheed Martin Corp.*, 415 F.Supp.2d 596 (D. Md.

2006). In so ruling, the court noted that the majority of courts addressing the question since 1959 had concluded that "an admiralty plaintiff's right to a bench trial 'trumps' the defendant's right to a jury trial of its counterclaim." App. 36a.

Lockheed Martin thereupon filed a petition for writ of mandamus with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit granted the petition for writ of mandamus and directed "the district court on remand to try the case before a jury." App. 1a, 19a; *In re Lockheed Martin Corp.*, 503 F.3d 351, 360 (4th Cir. 2007). In reaching that conclusion, however, the Fourth Circuit recognized that the Seventh Amendment "applies only to cases *at law*, a category that does not include *maritime* cases," and that "the Seventh Amendment creates no constitutional right to a jury trial of maritime claims." App. 5a (citing *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847) and *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963)) (emphasis by the court). The Fourth Circuit further acknowledged that, "if a plaintiff designates his claim as a Rule 9(h) maritime claim, the saving to suitors clause does not permit a defendant to trump that designation and demand a jury trial" (citing *Waring* at 461) and that "this principle governs simple proceedings—*e.g.*, proceedings where the defendant does not assert any counterclaims or implead third parties ... ." App. 12a.

The Fourth Circuit thus acknowledged that, when a plaintiff designates its claim as a Rule 9(h) maritime claim, the Seventh Amendment is not implicated, and this designation precludes the defendant from obtaining a jury trial when it does not assert any

counterclaims. Nevertheless, the Fourth Circuit proceeded to conclude precisely the opposite: Lockheed Martin was entitled to a jury trial, "even if no counterclaims had been filed." App. 15a.

On October 23, 2007, National Casualty's petition for rehearing en banc or for panel rehearing was denied. App. 42a.

REASONS FOR GRANTING THE PETITION

I. A WELL-DEVELOPED CIRCUIT CONFLICT EXISTS ON WHETHER A PLAINTIFF'S ELECTION OF AN ADMIRALTY BENCH TRIAL CAN BE NEGATED BY A DEFENDANT'S REQUEST FOR A JURY TRIAL

A. Petitioner Would Prevail In The Fifth Circuit, Which Holds That A Plaintiff's Admiralty Demand For A Bench Trial Overcomes A Subsequent Request For A Jury Trial By Another Party

The Fourth Circuit below acknowledged that the courts are split on the central issue in this case – whether a defendant may override a plaintiff's election, pursuant to Rule 9(h), to proceed in admiralty without a jury. *See* App. 12a-14a. Indeed, the Fourth Circuit's decision in this case directly conflicts with the decision of the Fifth Circuit in *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978). In *Harrison*, a longshoreman was injured aboard a freighter by exposure to ruptured barrels of a hazardous chemical, and he sued the vessel owner,

designating the action as being within the admiralty jurisdiction of the court under Rule 9(h). The defendant vessel owner then impleaded the plaintiff's stevedore employer, who, in turn, filed a fourth-party complaint against the shipper of the chemical. The fourth-party defendant shipper demanded a jury trial, but the trial court denied the request. After a bench trial, the court entered judgment against the shipper, and the shipper appealed, arguing (among other things) that it had been deprived of its Seventh Amendment right to trial by jury. *Id.* at 985.

The Fifth Circuit rejected that argument and held that, "by electing to proceed under [Rule] 9(h) rather than by invoking diversity jurisdiction, the plaintiff may preclude the defendant from invoking the right to trial by jury which may otherwise exist." *Id.* at 986. As the *Harrison* court explained, allowing a party defendant to force a jury trial by the "simple expedient" of asserting an additional claim "based upon the same set of operative facts which gave rise to the first complaint" would "emasculate the election given to the plaintiff by Rule 9(h)." *Id.* at 987. *Harrison* thus properly recognizes that when the same transaction or occurrence gives rise to a controversy that includes opposing claims by two or more parties that could be brought either in admiralty or at law, the election to proceed with or without a jury rests with the plaintiff under Rule 9(h).

Applying the Fifth Circuit's rule to this case, petitioner would prevail. Under the holding in

Harrison, the Fifth Circuit[1] would give effect to petitioner's election to proceed in admiralty without a jury, notwithstanding respondent's attempts to nullify that choice by demanding a jury for adjudication of the same factual dispute.

B. The Eighth And Ninth Circuits Adhere To The Erroneous Fourth Circuit Rule Below

In addition to the Fourth Circuit below,[2] the Eighth and Ninth Circuits follow the erroneous rule that a defendant can negate a plaintiff's election, pursuant to Rule 9(h), to proceed in admiralty without a jury.

In *Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026, 1032 (9th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992), the

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[1] The Fifth Circuit's preeminence as a maritime court has led the Ninth Circuit to describe it as the "cutwater" of maritime law. *Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 673 (9th Cir. 1997), *cert. denied*, *Polaris Ins. Co. v. Aqua-Marine Constructors, Inc.*, 522 U.S. 933 (1997).

[2] The Fourth Circuit's own confusion on this issue is evidenced by its conflicting earlier decision, albeit arguably in dictum. *See Duty v. East Coast Tender Service, Inc.*, 660 F.2d 933, 940 (4th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982) ("Both the *Harrison* opinion and the Advisory Committee Note, however, make altogether clear that 'a simple statement in his (plaintiff's) pleadings to the effect that the claim is an admiralty or maritime claim' would serve the purpose of making the case a true one in admiralty, and thereby eliminate any possibility of trial by jury."). The decision below squarely places the Fourth Circuit in the same camp as the Eighth and Ninth Circuits.

plaintiff Connecticut Bank & Trust Company, as trustee for Wartsila Marine Industries, Inc., brought an *in rem* action to foreclose on a first preferred mortgage against the S/S MONTEREY ("vessel"). Wilmington Trust, as trustee for the International Organization of Masters, Mates, and Pilots ("Union"), although not named as a defendant in the original complaint, answered the complaint and filed an *in rem* claim against the vessel to foreclose its second preferred mortgage and also asserted counterclaims against Wartsila. Notwithstanding that the Union's claims arose from the same transactions as did the plaintiff's initial complaint, the Union demanded a jury trial on its claims, and as to each claim the Union alleged an independent ground (other than admiralty) for federal jurisdiction. The district court denied the Union's request for a jury trial, and the Union sought a writ of mandamus from the Ninth Circuit.

The Ninth Circuit concluded that the Union, as a defendant, enjoyed its own option under the "saving-to-suitors" clause, 28 U.S.C. § 1331(1), to identify its claims as proceeding either in admiralty or at law. 934 F.2d at 1032. The Ninth Circuit thus held that the plaintiff's "election to proceed in admiralty does not deprive the [defendant] of a jury trial on the [defendant]'s properly joined claims." *Id.* The Ninth Circuit recognized, however, that as a practical matter this "holding may result in the entire case being tried before a jury." *Id.* Thus, under the *Wilmington Trust* rule, if a plaintiff elects to proceed in admiralty but a defendant asserts claims that "are closely related factually" (*id.*) *and* demands a trial by jury, then plaintiff's Rule 9(h) election will be trumped and given no effect.

Similarly, in *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1041-42 (8th Cir. 1983), the Eighth Circuit held that, even when a plaintiff has elected to proceed in admiralty without a jury pursuant to Rule 9(h), a defendant nonetheless has a right to demand a jury trial on a counterclaim that is within the court's civil jurisdiction. In *Koch Fuels*, the district court tried the plaintiff's admiralty claims without a jury, but granted the defendant's request for a separate jury trial of its counterclaim, notwithstanding that both plaintiff's and defendant's claims arose from the same "alleged agreement to charter a barge for transporting a shipment of oil." *Id.* at 1039. On appeal, the plaintiff argued that the entire case should have been tried without a jury, but the Eighth Circuit affirmed the district court's decision to sever the claims into separate trials. While the Eighth Circuit acknowledged that under traditional admiralty practice and Rule 9(h) the right to elect a jury trial belongs to the plaintiff (*id.* at 1041), the court nonetheless allowed the defendant a jury trial for its claim cognizable at common law, concluding that:

> Where, as here, both parties, using different triers of fact, could prevail on their respective claims without prejudicing the other party or arriving at inconsistent results, a trial judge may separate the claims in the interests of preserving constitutional rights, clarity, or judicial economy.

Id. at 1042. Thus, similar to *Wilmington Trust*, in *Koch Fuels* the defendant was allowed to trump the plaintiff's Rule 9(h) non-jury election and obtain a jury trial.

C. Contrary To The Fourth, Eighth And Ninth Circuits, The Overwhelming Majority Of District Courts Hold That A Defendant *Cannot* Override A Plaintiff's Election To Proceed In Admiralty Without A Jury

In addition to the conflicting decisions between courts of appeals on this issue, many district courts have also considered the issue raised here and have arrived at conflicting results. The overwhelming majority of district courts to consider the issue, however, have agreed with petitioner and the Fifth Circuit in *Harrison* – contrary to the holdings of the Fourth, Eighth and Ninth Circuits – that when a plaintiff elects to proceed in admiralty pursuant to Rule 9(h), and a defendant then files a counterclaim seeking the same relief on the basis of the saving-to-suitors clause and diversity jurisdiction, the defendant is not entitled to a jury trial for its counterclaim. *See, e.g., ING Groep, NV v. Stegall*, 2004 A.M.C. 2992, 2995-98 (D. Colo. 2004); *Windsor Mount Joy Ins. Co. v. Johnson*, 264 F.Supp.2d 158, 162-64 (D. N.J. 2003); *Jefferson Ins. Co. v. Maine Offshore Boats, Inc.*, 2001 A.M.C. 2171, 2172-74 (D. Me. 2001); *Clarendon Amer. Ins. Co. v. Rodriguez*, 1999 A.M.C. 2885, 2886-87 (D. P.R. 1999); *Underwriters at Lloyds, London v. Sundowner Offshore Services*, 1999 WL 90566, *1 (E.D. La. 1999); *St. Paul Fire & Marine Ins. Co. v. Holiday Fair, Inc.*, 1996 WL 148350, *2 (S.D.N.Y. 1996); *Homestead Ins. Co. v. Woodington Corp.*, 1993 A.M.C. 1552, 1554-58 (E.D. Va. 1992); *Royal Insurance Co. of America v. Hansen*, 125 F.R.D. 5, 9 (D. Mass. 1988); *Zurich Ins. Co. v. Banana Services, Inc.*, 1985 A.M.C. 1745 (S.D. Fla. 1984); *Insurance Co. of North America v. Virgilio*, 574 F.Supp. 48 (S.D. Cal. 1983); *Arkwright-*

Boston Manufacturers Mutual Ins. Co. v. Bauer Dredging Co., 74 F.R.D. 461, 462 (S.D. Tex. 1977); *Insurance Co. of the State of Pennsylvania v. Amaral*, 44 F.R.D. 45, 47 (S.D. Tex. 1968); *contra, Continental Ins. Co. v. Industry Terminal & Salvage Co.*, 2006 A.M.C. 630 (W.D. Pa. 2005); *Sphere Drake Ins. PLC v. J. Shree Corp.*, 184 F.R.D. 258 (S.D.N.Y. 1999).

This Court's guidance therefore is urgently needed in view of the deep conflict among the courts of appeals and district courts on this important and recurring issue.

II. THE FOURTH CIRCUIT'S RULE IS INCONSISTENT WITH THIS COURT'S PRECEDENT AND THE FEDERAL RULES

A. The Fourth Circuit's Decision Directly Conflicts With This Court's Decision In *Waring v. Clarke*

In *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847), this Court held that the Seventh Amendment does not apply to admiralty cases, even when there is concurrent jurisdiction with the law side of the court under the "saving-to-suitors" clause.[3] In *Waring*, two

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[3] Now codified at 28 U.S.C. § 1333(1), the saving-to-suitors clause provides that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of ... [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

vessels had collided on the Mississippi River. The defendant challenged the admiralty jurisdiction of the federal courts on two grounds, one of which was that the saving-to-suitors clause took away from admiralty jurisdiction cases in which common law courts were competent to give a remedy in a trial by jury. *Id.* at 458.

In rejecting that argument, this Court noted there was nothing in the Constitution from which it could be inferred that suits in admiralty, being civil causes rather than common law causes, were ever to be tried to a jury:

> [T]here is no provision, as the constitution originally was, from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the constitution knew was the mode of trial of issues of fact in the admiralty. We confess, then, we cannot see how they are to be embraced in the seventh amendment of the constitution, providing that in suits at common law the trial by jury should be preserved.

Id. at 460. The *Waring* Court noted that suits in admiralty were constitutionally distinct from suits at common law, and therefore the mode of trial in admiralty actions cannot be controlled by the Seventh Amendment, which only preserves jury trials in common law cases:

> Now by what rule of interpretation or by what course of reasoning can such a provision [the Seventh Amendment] be converted into an

> inhibition upon the mode of trial of suits [in admiralty] which are not exclusively suits at common law ...?

Id. The Court concluded that the adoption of the Seventh Amendment "was done with reference to suits at common law alone." *Id.* Thus, *Waring* confirmed that the Seventh Amendment did not change the rule that trials in admiralty are strictly non-jury (unless the right to a jury was established by Congress).[4]

The *Waring* Court also rejected the argument that the saving-to-suitors clause provided the defendant a right to a jury trial in an admiralty case:

> In respect to the [saving-to-suitors] clause ... saving is for the benefit of suitors, plaintiff and defendant, when the plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them. It certainly could not have been intended more for the benefit of the defendant than for the plaintiff, which would be the case if he could at his will force the plaintiff into a common law court ... .

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[4] Congress specifically provided for jury trials in the Great Lakes Act, codified at 28 U.S.C. § 1873, and the Jones Act, now codified at 46 U.S.C. § 30104.

Id. at 460-61. The saving-to-suitors clause therefore does not enable a defendant to force a trial by jury when the plaintiff has sued in admiralty.

Although the Fourth Circuit below cited *Waring* and correctly stated that "if a plaintiff designates his claim as a Rule 9(h) maritime claim, the saving-to-suitors clause does not permit a defendant to trump that designation and demand a jury trial" (App. 12a),[5] it held that, because this case filed in admiralty seeks a declaratory judgment, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), "requires a jury trial in this case, even if no counterclaims had been filed." App. 15a.

In so holding, the Fourth Circuit decision directly conflicts with *Waring*. In a declaratory judgment action filed in admiralty in the Fourth Circuit for which there is also diversity jurisdiction, all that a defendant has to do is to demand a jury trial and, contrary to *Waring*, it will thereby "force the plaintiff into a common law court" (46 U.S. at 461), and the Seventh Amendment will "be converted into an inhibition upon the mode of trial in suits which are not exclusively suits at common law." *Id.* at 460. *Waring* precludes that result.

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[5] The late Judge Widener seemed to feel otherwise, however. During the oral argument Judge Widener said: "The court in the Waring case described almost to a T the proposition that we have here and came [out] on the opposite side. I have yet to see some explanation from someone why the Waring case does not control this case."

B. The Fourth Circuit's Rule Cannot Be Squared With The Federal Rules

The Fourth Circuit's opinion allows a defendant in a declaratory judgment action in admiralty to eviscerate a plaintiff's right to a non-jury trial under Rule 9(h) and Rule 38(e) of the Federal Rules of Civil Procedure, contrary to the intent of those rules and historical admiralty practice and procedures.

For more than two hundred years, this Court has repeatedly recognized that, when a plaintiff files its complaint based on admiralty jurisdiction, jury trials are not available, unless Congress provides otherwise. *See, e.g., United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796) (as it was "a cause of Admiralty and Maritime Jurisdiction ... no jury was necessary"); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55 n.10 (1989) ("Civil causes of action in admiralty, however, are not suits at common law for Seventh Amendment purposes, and thus no constitutional right to a jury trial attaches."). That practice was not changed by the unification in 1966 of the Admiralty Rules with the Rules of Civil Procedure, resulting in Rules 9(h) and 38(e).

That year, pursuant to authority delegated by Congress (28 U.S.C. § 2072), this Court prescribed rules of practice and procedure for the federal courts that resulted in Rules 9(h) and 38(e) of the Federal Rules of Civil Procedure. Rule 9(h) states:

> **Admiralty and Maritime Claims.** A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction

> that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims.

Rule 9(h), Federal Rules of Civil Procedure (2005). Rule 38(e) provides:

> **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 38(e), Federal Rules of Civil Procedure (2005). By "these rules," Rule 38(e) is referring to Rule 38(a)-(d); Rule 38(a) provides:

> **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 38(a), Federal Rules of Civil Procedure.

The Advisory Committee's Notes to Rule 9(h) inform the analysis of the intent of this rule as to "historically maritime procedures":

> Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. ...

> It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. ... The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear. ...
>
> [T]he preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

Rule 9, Federal Rules of Civil Procedure, Advisory Committee Note – 1966 Amendment. 39 F.R.D. 69, 75-76 (1966).

The rules proposed by the Advisory Committee, including Rules 9(h) and 38(e), were approved by this Court without alteration.[6] Rules 9(h) and 38(e) were prepared and approved by this Court, pursuant to the Court's delegated authority to adopt procedural rules that do not "abridge, enlarge or modify any substantive

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[6] *Order of February 28, 1966*, 86 S.Ct. 173, 39 F.R.D. 213 (1966).

right." 28 U.S.C. § 2072. Thus, the adoption of these rules preserved the historical maritime right and practice of trying cases filed on the admiralty "side" of a federal court without a jury. The Fourth Circuit's decision in this declaratory judgment action conflicts with this important and historical admiralty right and practice, and this Court should grant this petition for writ of certiorari, so that it may review that decision.

C. The Fourth Circuit's Reliance On *Beacon Theatres* Is Misplaced

The Fourth Circuit's reliance on *Beacon Theatres* is fundamentally misplaced, as *Beacon Theatres* involves neither the federal court's admiralty jurisdiction nor the plaintiff's election under Rule 9(h) to proceed in admiralty without a jury trial, both of which control whether a defendant has the right to a jury trial in this case.

In *Beacon Theatres*, Fox West Coast Theatres was notified by Beacon Theatres that Fox was operating its theater in violation of the Sherman Antitrust Act by exercising preferential contract rights to show first-run movies to the exclusion of Beacon. To resolve the dispute, Fox filed a declaratory judgment action for a declaration that it was not operating in violation of the antitrust laws and sought injunctive relief against Beacon. Beacon counterclaimed for treble damages and demanded a jury trial. The district court rejected Beacon's jury demand on the ground that the proceeding was equitable in nature, and the Ninth Circuit denied mandamus. This Court granted certiorari and reversed, holding that the Declaratory Judgment Act and applicable Federal Rules of Civil

Procedure were intended to preserve each party's right to a jury trial. 359 U.S. at 504.

Critical to this Court's decision, however, was that any right to jury trial was preserved by the Declaratory Judgment Act and the Federal Rules, citing Rule 38(a) that "the right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved ... inviolate." *Id.* at 510. Since the Federal Rules expressly preserved Beacon's Seventh Amendment right to a jury trial, the district court could not preclude a jury trial on the issues in that case.

Here, however, petitioner expressly has invoked the right to a non-jury trial by electing to proceed in admiralty under Rule 9(h), and in that jurisdictional status neither the Seventh Amendment nor any statute provides respondent with a right to a jury trial. The purpose of Rule 38(e) was to make it clear that no new jury rights were created by the unification of the Admiralty Rules with the Federal Rules of Civil Procedure – that the traditional admiralty practice of non-jury trials was preserved. Consequently, the Seventh Amendment does not come into play in this case, and *Beacon Theatres* is simply inapplicable.

The Fourth Circuit below relied heavily on its interpretation of *Beacon Theatres* to the effect that "the Seventh Amendment right to a jury trial must be preserved 'wherever possible.'" App. 14a. But that statement does not apply in the admiralty context, as this Court has confirmed that *Beacon Theatres* did not alter the rule set forth in *Waring*. *See Fitzgerald v.*

United States Lines Co., 374 U.S. 16, 20 (1963) ("the Seventh Amendment does not require jury trials in admiralty cases") (citing *Waring*); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 334 (1979) (*Beacon Theatres* "enunciated no more than a general prudential rule"); *Granfinanciera v. Nordberg*, 492 U.S. 33, 55 n.10 (1989) ("Civil causes of action in admiralty, however, are not suits at common law for Seventh Amendment purposes, and thus no constitutional right to a jury trial attaches. *Waring v. Clarke*, 5 How. 441, 460 (1847)").

Moreover, in *Beacon Theatres* this Court stated that its decision was "consistent" with the Declaratory Judgment Act's plan to effect substantial procedural reform "while retaining a distinction between jury and non-jury issues and leaving substantive rights unchanged." 359 U.S. at 508-09. This is consistent with the district court's decision in this case, noting that the majority line of cases does not apply *Beacon Theatres* in the admiralty context:

> [N]early half a century has passed since the Supreme Court handed down *Beacon Theatres*. If *Beacon Theatres* applied to admiralty suits, the Court's silence on this question appears inexplicable, especially in light of the numerous decisions that have held to the contrary.

App. at 38a; *National Casualty Co. v. Lockheed Martin Corp.*, 415 F. Supp.2d 596, 606 (D. Md. 2006).[7]

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[7] *See, e.g.*, *ING Groep, NV v. Stegall*, 2004 A.M.C. 2992, 2995-98 (D. Colo. 2004); *Windsor Mount Joy Ins. Co. v. Johnson*, 264

The mere fact that National Casualty filed a declaratory judgment action to resolve this marine insurance dispute does not deprive it of its right to a non-jury trial by electing to proceed as an admiralty or maritime claim within the meaning of Rule 9(h) and to avail itself of the procedural and substantive rights admiralty practice entails. Thus, *Beacon Theatres* does not strip a plaintiff of its right to a non-jury trial in an admiralty case.

F.Supp.2d 158, 162-64 (D. N.J. 2003); *Jefferson Ins. Co. v. Maine Offshore Boats, Inc.*, 2001 A.M.C. 2171, 2172-74 (D. Me. 2001); *Clarendon Amer. Ins. Co. v. Rodriguez*, 1999 A.M.C. 2885, 2886-87 (D. P.R. 1999); *Underwriters at Lloyds, London v. Sundowner Offshore Services*, 1999 WL 90566, *1 (E.D. La. 1999); *St. Paul Fire & Marine Ins. Co. v. Holiday Fair, Inc.*, 1996 WL 148350, *2 (S.D.N.Y. 1996); *Homestead Ins. Co. v. Woodington Corp.*, 1993 A.M.C. 1552, 1554-58 (E.D. Va. 1992); *Royal Insurance Co. of America v. Hansen*, 125 F.R.D. 5, 9 (D. Mass. 1988); *Zurich Ins. Co. v. Banana Services, Inc.*, 1985 A.M.C. 1745 (S.D. Fla. 1984); *Arkwright-Boston Manufacturers Mutual Ins. Co. v. Bauer Dredging Co.*, 74 F.R.D. 461, 462 (S.D. Tex. 1977); *Insurance Co. of the State of Pennsylvania v. Amaral*, 44 F.R.D. 45, 47 (S.D. Tex. 1968). *See also Norwalk Cove Marina, Inc. v. S/V ODYSSEUS*, 100 F.Supp.2d 113, 114 (D. Conn. 2000) (the contrary approach set forth in *Wilmington Trust v. United States District Court*, 934 F.2d 1026 (9th Cir. 1991) "remains to date a minority position"), *aff'd on other grounds*, 64 Fed. Appx. 319 (2d Cir. 2003) (unpublished opinion).

III. THE PETITION RAISES AN IMPORTANT AND RECURRING ISSUE

A. This Petition Concerns Issues Of National Importance

This Court in 1874 explained the reasons for and the importance of the principle of uniformity of maritime law:

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the *rules and limits of maritime law* under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a *commercial character* affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. 558, 575 (1874) (emphasis added); *see also, Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.*, 543 U.S. 14, 28 (2004) (quoting *The Lottawanna*). Certainly, the important question of the availability of a jury trial in admiralty is the sort of "rule and limit of maritime law" as to which there must be "uniformity and consistency," although the uniformity in this case is derived from Rules 9(h) and 38(e). *See, e.g., La Vengeance, supra*; *Waring, supra*; *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 360

(1962); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). Marine insurance claims have long comprised an important "subject of a commercial character" within admiralty jurisprudence. *See, e.g., De Lovio v. Boit*, 7 Fed. Cas. 418, 444 (Cir. Ct. Mass. 1815) (Story, J.); *New England Mut. Marine Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 30-31 (1871); *Sun Mutual Ins. Co. v. Ocean Insurance*, 107 U.S. 485 (1883).

Marine insurers underwrite marine risks in many areas of the United States, and a uniform rule concerning the right to ascertain the existence and scope of coverage in non-jury declaratory judgment cases, as opposed to conflicting rights to non-jury trials among the circuits, would promote the uniformity of maritime law and commerce in the nation. Thus, this Court should review the Fourth Circuit's decision and establish a uniform rule applicable to all federal courts.

B. The Insurer's Right To A Non-Jury Trial In Admiralty Is A Recurring Issue

The declaratory judgment action is a common and well-established method of determining the rights of the parties under an insurance contract. *See, e.g., Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1276 (10th Cir. 1989) (a judicial declaration of coverage "clarifies the parties' legal relations and affords relief from the uncertainty surrounding [the insurer's] obligations"); *Windsor Mount Joy Ins. Co. v. Johnson*, 264 F.Supp.2d 158, 164 (D. N.J. 2003) ("An insurer's action for a judgment

declaring that it need not provide coverage under a policy 'is a normal and orderly procedure.'") (internal citation omitted).

As set forth in Part I, above, numerous courts, both trial and appellate, have issued rulings on the right to a jury trial in a marine insurer's declaratory judgment action. Given the well-established and orderly mechanism in place to ascertain the rights of the parties to an insurance contract and to afford relief from uncertainty, marine insurers will continue to seek declaratory judgments in the federal courts, and the issue whether they are entitled to non-jury trials will continue to recur.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLUTION OF THE CONFLICT

A. Review Of The Fourth Circuit's Writ Of Mandamus Presents The Issue In Its Purest And Simplest Form

In *Beacon Theatres*, this Court granted certiorari to resolve the dispute whether the defendant had a right to a jury trial. That case, like this one, arose when the trial court struck the defendant's jury demand, and that ruling was appealed in a petition for writ of mandamus. Although a writ of mandamus was denied in *Beacon Theatres* and granted by the Fourth Circuit below, the context is identical: whether the defendant had the right to try its case before a jury.

Trial has not yet been scheduled in the district court below. Therefore, certiorari to review the writ of mandamus issued by the Fourth Circuit presents the

ideal opportunity to resolve the conflict among the lower courts on a pure issue of law.

B. There Are No Other Jurisdictional Or Procedural Impediments To This Court's Resolution Of The Issue

In the district court, both parties agreed, and the district court has ruled, that both admiralty and diversity jurisdiction exist, and it is undisputed that National Casualty invoked admiralty jurisdiction and its associated procedures by electing to proceed under Rule 9(h). In addition, trial has not yet occurred or been scheduled, and only the ruling of the Fourth Circuit reversing the district court's order striking Lockheed Martin's jury demand is at issue in this appeal. Because the only issue in this case, with its procedural posture, is whether National Casualty may proceed with its action without a jury, there are no impediments to this Court resolving whether a defendant has the right to impose a jury trial on a plaintiff in a declaratory judgment action in admiralty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06-1344

[Filed September 27, 2007]

In Re: LOCKHEED MARTIN CORPORATION, Petitioner.	)

On Petition for Writ of Mandamus.
(8:05-cv-01992-AW)

Argued: January 31, 2007

Decided: September 27, 2007

Before TRAXLER and GREGORY, Circuit Judges, and WIDENER,[1] Senior Circuit Judge.

Petition granted by published opinion. Judge Traxler wrote the opinion, in which Judge Gregory joined.

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[1] Judge Widener heard oral argument in this case but died prior to the time the decision was filed. The decision is filed by a quorum of the panel. 28 U.S.C. § 46(d).

COUNSEL

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OPINION

TRAXLER, Circuit Judge:

At issue in this case is the right to a jury trial in an admiralty case. Lockheed Martin owns a ship that was damaged at sea, and a dispute over insurance coverage arose between Lockheed and its insurer, National Casualty Company. National filed a declaratory judgment action in district court, designating the action as one proceeding under the court's admiralty jurisdiction and thus without a jury. Lockheed asserted compulsory counterclaims and requested a jury trial. The district court struck Lockheed's request for a jury trial, and Lockheed filed this petition for writ of mandamus, arguing that it has a Seventh Amendment right to a jury trial. We grant the petition, issue the writ, and remand with directions that the district court grant Lockheed's jury demand.

I.

The relevant facts of this case are fairly simple. Lockheed owned a ship that was damaged at sea in June 2001. The ship was insured by National Casualty Company. In April 2005, Lockheed submitted a claim for more than $2,600,000 in damages. Lockheed informed National that it intended to file suit by July

29, 2005, unless National acknowledged that the policy established a six-year statute of limitations.

On July 22, 2005, National preemptively filed a declaratory judgment action seeking a declaration that Lockheed's claims were time-barred under the policy. In accordance with the rules governing admiralty claims, National designated its action as a non-jury admiralty claim. National later amended its complaint, seeking in the alternative a declaration of Lockheed's amount of loss. Lockheed filed an answer and asserted a counterclaim seeking payment for the damage to the ship. Lockheed requested a jury trial on its counterclaim.

Lockheed later filed a motion for judgment on the pleadings. Lockheed asserted that National's first request for declaratory relief (that the claims were untimely) should be dismissed because Lockheed's claim was timely under the policy. Lockheed then argued that the district court should exercise its discretion and dismiss National's second request for declaratory relief (for a determination of the amount of loss), so that Lockheed's counterclaim (which raised the same issue) could be tried by a jury.

The district court concluded that the policy established a six-year limitations period, and the court therefore dismissed National's first request for declaratory relief. The district court, however, concluded that Lockheed did not have a right to a jury trial. The court therefore declined to dismiss National's second request for declaratory relief, and the court struck Lockheed's jury demand. Lockheed then filed this petition for a writ of mandamus,

arguing that the district court's ruling improperly deprived it of its right to a jury trial.

II.

Before considering the merits of Lockheed's claims, we pause to address a threshold issue raised by National. It is well established that mandamus is a drastic remedy that should only be used in extraordinary circumstances and may not be used as a substitute for appeal. *See, e.g., Kerr v. United States Dist. Court,* 426 U.S. 394, 402 (1976); *In re Catawba Indian Tribe of South Carolina,* 973 F.2d 1133, 1136 (4th Cir. 1992). National contends that Lockheed could raise the jury trial issue on appeal from a final judgment, *see First Nat'l Bank of Waukesha v. Warren,* 796 F.2d 999, 1006 (7th Cir. 1986), and that Lockheed's resort to mandamus is therefore improper. We disagree.

In this circuit, a petition for a writ of mandamus is the proper way to challenge the denial of a jury trial. *See General Tire & Rubber Co. v. Watkins,* 331 F.2d 192, 194 (4th Cir. 1964) ("We are inclined to the view that General's petition for Writ of Mandamus is properly before us for consideration since the question presented pertains to a denial of the constitutional right to trial by jury."); *see also Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 511 (1959) ("[T]he right to grant mandamus to require jury trial where it has been improperly denied is settled."). Because Lockheed's petition for a writ of mandamus is a proper vehicle for challenging the district court's decision, we now turn to the merits of Lockheed's claims.

III.

Lockheed contends that it has a Seventh Amendment right to a jury trial of its breach of contract claims asserted against National. Before we consider the specifics of Lockheed's claims, it is helpful to outline the legal framework under which the claims must be analyzed.

A.

The Seventh Amendment preserves the right to a jury trial "[i]n suits at common law." U.S. Const. amend. VII. The Seventh Amendment's guarantee of a jury trial, however, applies only to cases *at law*, a category that does not include *maritime* cases. *See Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847). Thus, in general terms, the Seventh Amendment creates no constitutional right to a jury trial of maritime claims.[2] *See Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963); *see also Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 152-53 (4th Cir. 1995) ("While the Seventh Amendment guarantees a jury trial in cases 'at common law,' no constitutional provision guarantees, or indeed prohibits, jury trials for cases tried in equity or in admiralty.").

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[2] Congress has created a statutory right to jury trial in certain admiralty cases. *See* 28 U.S.C.A. § 1873 (establishing right to jury trial for admiralty tort or contract cases involving certain Great Lakes shipping and coasting trade vessels); 46 U.S.C.A. § 30104(a) (giving injured seamen a right to a jury trial in Jones Act cases).

The role of a jury trial in admiralty cases, however, is complicated by the "saving to suitors" clause of 28 U.S.C.A. § 1333 (West 2006). Section 1333 states that "district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*" 28 U.S.C.A. § 1333(1) (emphasis added).

The Supreme Court has explained that the saving-to-suitors clause preserves a plaintiff's right to a common law remedy "in all cases where the common law is competent to give it." *Leon v. Galceran,* 78 U.S. (11 Wall.) 185, 191 (1870) (internal quotation marks omitted). The common law is "competent" in cases proceeding *in personam,* but not those proceeding *in rem*. *See id.*; *Madruga v. Superior Court of California,* 346 U.S. 556, 560-61 (1954). Accordingly, while "federal courts have exclusive jurisdiction over *in rem* actions, federal and state courts have concurrent jurisdiction over *in personam* actions, and the effect of the clause is to give an *in personam* plaintiff the choice of proceeding in an ordinary civil action, rather than bringing a libel in admiralty." *In re: Chimenti,* 79 F.3d 534, 537 (6th Cir. 1996) (citation and internal quotation marks omitted).

The effect of the saving-to-suitors clause as interpreted by the Supreme Court is to give a maritime plaintiff several options when bringing suit:

> First, the claimant may invoke federal admiralty jurisdiction under the grant of original subject matter jurisdiction over

> admiralty, maritime, and prize cases set out in Section 1333. Neither diversity of citizenship nor a minimum amount in controversy need be shown under the statute. On the other hand, most plaintiffs have no right to a trial by jury if they invoke the federal court's general admiralty jurisdiction. Second, by virtue of the "saving clause," plaintiff also may sue at law in a state court or in a United States district court. However, to pursue the latter choice, the requirements of diversity of citizenship and jurisdictional amount must be satisfied.

Id. (quoting 14 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 3672, at 431-33 (1985)); *see also Concordia Co. v. Panek,* 115 F.3d 67, 70 (1st Cir. 1997); *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054 (9th Cir. 1997).

Perhaps the most important aspect of an admiralty plaintiff's right to proceed "at law" in state or federal court is the right to demand a jury trial. *See Ghotra,* 113 F.3d at 1054 ("The difference between [proceeding in admiralty or at law in state or federal court] is mostly procedural; of greatest significance is that there is no right to jury trial if general admiralty jurisdiction is invoked, while it is preserved for claims based in diversity or brought in state court."). An admiralty plaintiff who chooses to proceed "at law," whether in state or federal court, thus has the right under the saving-to-suitors clause to demand a jury trial.

The procedures for invoking the federal court's admiralty jurisdiction are governed by Rule 9(h) of the

Federal Rules of Civil Procedure. Rule 9(h) provides that:

> A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. . . .

Fed. R. Civ. P. 9(h). In this case, National designated its declaratory judgment action as one proceeding in admiralty.

B.

We turn now to Lockheed's claim that it is entitled to a jury trial. Lockheed argues that because it asserted an *in personam* counterclaim against National, the parties are diverse and the amount-in-controversy requirement is satisfied, it has the right under the saving-to-suitors clause to demand a jury trial on the counterclaim. Lockheed also contends that it has a right to a jury trial under *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), in which the Supreme Court held that the right to a jury trial in a declaratory judgment action depends on whether there would have been a right to a jury trial

had the action proceeded without the declaratory judgment vehicle. *See id.* at 504.

As to Lockheed's counterclaim argument, National contends that Lockheed's counterclaim is not a true counterclaim, but is merely the flip side of National's declaratory judgment claim. National seeks a declaration that there is no coverage and a declaration of the amount owed if there is coverage, and Lockheed asserts in the counterclaim that there is coverage and that the loss amount is more than National will admit. National argues that if this kind of in-name-only counterclaim is enough to require a jury trial in an admiralty case, then the plaintiff's historic right to decide whether to proceed in admiralty will be eviscerated. And even if Lockheed's counterclaim is a true counterclaim, National argues that its Rule 9(h) admiralty designation is controlling and prevents Lockheed from obtaining a jury trial. As to Lockheed's *Beacon Theatres* argument, National contends that *Beacon Theatres* involved common law claims for which there is a Seventh Amendment right to a jury trial and that the Supreme Court's decision in that case was driven by a need to protect the defendant's constitutional right to a jury trial. *See Beacon Theatres,* 359 U.S. at 510-11. This case, by contrast, involves admiralty claims, for which there is no constitutional right to a jury trial. National thus contends that *Beacon Theatres* is simply inapplicable to this case.

At the heart of National's position is its view that the Seventh Amendment is inapplicable to admiralty claims. While it is correct that the Seventh Amendment does not create a right to a jury trial on

maritime claims, we believe that National's position oversimplifies the matter.

As discussed above, the effect of the saving-to-suitors clause is to permit maritime *in personam* claims to be pursued in federal court as maritime (and thus non-jury) claims, in state court as legal claims, or in federal court as legal claims (for which a jury trial is available) if an independent basis for federal court jurisdiction exists. If an admiralty claim is tried "at law," the claim nonetheless remains an admiralty claim, and substantive admiralty law governs the disposition of the claim. *See, e.g., Zych v. Unidentified, Wrecked & Abandoned Vessel,* 941 F.2d 525, 533 n. 12 (7th Cir. 1991) (explaining that the saving-to-suitors clause creates "an area of concurrent jurisdiction for admiralty cases which can be pursued *in personam* in state court. However, federal law must be applied to these state court suits because they remain admiralty cases."). That such claims remain admiralty claims, however, does not mean that the Seventh Amendment is inapplicable.

In *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355 (1962), a longshoreman injured while unloading cargo brought suit against the owners of the ship carrying the cargo. Diversity jurisdiction existed, and the plaintiff designated the action as one at law and demanded a jury trial. The vessel owners impleaded the stevedore for whom the longshoreman worked, arguing that the stevedore was negligent as to the manner in which the vessel was unloaded and that the stevedore should indemnify the vessel owners if they were found liable to the longshoreman. Answering special interrogatories, the

jury found the vessel owners liable but found no fault on the part of the stevedore. On appeal, the circuit court affirmed the jury's verdict against the vessel owners but reversed the judgment in favor of the stevedore, concluding that the stevedore was negligent as a matter of law. *See id.* at 357-58.

The Supreme Court reversed the decision of the circuit court. The Court explained that "[t]he requirements of the Seventh Amendment were brought into play in this case, even though a stevedoring contract is a maritime contract." *Id.* at 359. The Court held that "[t]his suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury," *id.* at 360, and that the manner in which the circuit court rejected the jury verdict violated the Seventh Amendment's prohibition against the re-examination of facts found by a jury.[3] *See id.* at 364.

In our view, *Ellerman* makes it clear that the Seventh Amendment applies to admiralty claims that are tried "at law" by way of the saving-to-suitors clause. *See id.* at 359-60; *see also Vodusek,* 71 F.3d at 152-53 (recognizing that the Seventh Amendment applies to admiralty claim that is cognizable at law); *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil,* 704 F.2d 1038, 1041 (8th Cir. 1983) (same). There is an important difference, however, between *Ellerman* and the case at bar. Whereas in *Ellerman* the plaintiff

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[3] *See* U.S. Const. amend. VII ("[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.").

elected to proceed at law, the plaintiff here elected to proceed in admiralty. We do not believe, at least in this case, that this factual difference is relevant.

Generally speaking, the right to determine whether a claim will proceed as an admiralty claim (without a jury) or as a common law claim (with a jury) belongs strictly to the plaintiff. That is, if a plaintiff designates his claim as a Rule 9(h) maritime claim, the saving-to-suitors clause does not permit a defendant to trump that designation and demand a jury trial. *See Waring,* 46 U.S. at 461 ("The saving is for the benefit of suitors, plaintiff and defendant, when the plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them. It certainly could not have been intended more for the benefit of the defendant than for the plaintiff, *which would be the case if he could at his will force the plaintiff into a common law court . . . .* " (emphasis added)); *see also Becker v. Tidewater, Inc.*, 405 F.3d 257, 259 (5th Cir. 2005) (concluding that defendant had no right to a jury trial even though parties were diverse because plaintiff elected to proceed in admiralty). While this principle governs simple proceedings—*e.g.*, proceedings where the defendant does not assert any counterclaims or implead third parties—there is some dispute about its application to more complex cases.

In cases involving counterclaims or cross-claims that could proceed at law, courts are divided on the question of whether the plaintiff's Rule 9(h) admiralty designation prevents the defendant from obtaining a jury trial. Some courts have concluded that the

plaintiff's Rule 9(h) designation is controlling and that no jury trial is permitted. *See, e.g., Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 987 (5th Cir. 1978) (concluding that the plaintiff's Rule 9(h) election prohibited a jury trial of legal claims raised in third-party complaint: "[W]e refuse to permit a third-party defendant to emasculate the election given to the plaintiff by Rule 9(h) by exercising the simple expedient of bringing in a fourth-party defendant."); *Windsor Mount Joy Mut. Ins. Co. v. Johnson*, 264 F. Supp. 2d 158, 162 (D.N.J. 2003) (concluding that plaintiff's Rule 9(h) election to proceed in admiralty jurisdiction could not be "undone . . . through the assertion of a counterclaim that might have been subject to the Court's jurisdiction under Section 1332 and a jury trial if brought in a separate action"); *Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co.*, 90 F.R.D. 313, 317 (E.D.N.Y. 1981) (concluding that a "plaintiff's election to sue on an admiralty or maritime claim as the basis for federal jurisdiction binds the parties in the lawsuit to the inevitable procedural consequence of a court trial, . . . even where a 'legal' counterclaim has been interposed" (citation omitted)).

Other courts, however, have concluded that a plaintiff's Rule 9(h) designation cannot trump the defendant's Seventh Amendment right to a jury trial on a legal counter- or cross-claim. *See, e.g., Wilmington Trust v. United States Dist. Court*, 934 F.2d 1026, 1032 (9th Cir. 1991) (concluding that the plaintiff's "election to proceed in admiralty does not deprive the Union of a jury trial on the Union's properly joined [counter]claims"); *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1041-42 (8th Cir.

1983) (concluding that intervenor-defendant had the right to a jury trial on its breach of contract counterclaim notwithstanding the fact that the plaintiff elected under Rule 9(h) to proceed on its claims in admiralty); *Sphere Drake Ins. PLC v. J. Shree Corp.*, 184 F.R.D. 258, 261 (S.D.N.Y. 1999) (concluding that defendant asserting compulsory legal counterclaims was entitled to a jury trial even though plaintiff had elected to proceed in admiralty).

In our view, allowing a plaintiff's Rule 9(h) designation to preclude a jury trial on compulsory legal counter- or cross-claims effectively and improperly elevates the traditional mode of trial in admiralty (a bench trial) to a right *not* to proceed before a jury. While the Constitution does not give an admiralty plaintiff the right to a jury trial, it likewise does not give the plaintiff a right to a bench trial. *See Fitzgerald*, 374 U.S. at 20 ("While this Court has held that the Seventh Amendment does not require jury trials in admiralty cases, neither that Amendment nor any other provision of the Constitution forbids them. Nor does any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases." (footnotes omitted)); *Vodusek*, 71 F.3d at 152-53. To permit the plaintiff's choice of a customary but not constitutionally required mode of trial to prevent a defendant from taking advantage of his constitutionally guaranteed mode of trial is inconsistent with the Supreme Court's admonition that the Seventh Amendment right to a jury trial must be preserved "wherever possible." *Beacon Theatres*, 359 U.S. at 510.

As noted above, however, National contends that the counterclaims asserted by Lockheed are not true counterclaims. National contends that Lockheed's claims are simply the flip side of National's own claims and add no new issue to the litigation. National argues that permitting a jury trial on the basis of such claims would eviscerate the admiralty plaintiff's traditional right to control the manner in which his claims will be tried. We agree with National that permitting such counterclaims to effectively undo the plaintiff's Rule 9(h) designation would be inconsistent with the historic admiralty practice of giving the plaintiff the power to determine the manner in which his claims would be tried. We need not decide, however, whether the counterclaims asserted by Lockheed are "true" counterclaims, nor need we decide how a defendant's jury demand would be resolved if his counterclaims were not true counterclaims. We need not consider these issues because we agree with Lockheed that *Beacon Theatres* requires a jury trial in this case, even if no counterclaims had been filed.

In *Beacon Theatres,* Beacon notified Fox West Coast Theatres that it believed Fox was violating the Sherman Act. Fox thereafter brought a declaratory judgment action seeking a declaration that its conduct did not violate the Sherman Act. Beacon answered and counterclaimed, seeking treble damages under the Sherman Act and demanding a jury trial. The district court concluded that Fox's declaratory judgment claims were equitable in nature and that a bench trial on the issues raised in Fox's complaint would be held *before* a jury considered Beacon's treble-damages claim. *See id.* at 502-04. The Supreme Court held that the district court erred by viewing Fox's claims as

equitable. The Court explained that the Declaratory Judgment Act,

> while allowing prospective defendants to sue to establish their nonliability, specifically preserves the right to jury trial for both parties. *It follows that if Beacon would have been entitled to a jury trial in a treble damage suit against Fox it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first.* Since the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade, the Sherman and Clayton Act issues on which Fox sought a declaration were essentially jury questions.

Id. at 504 (emphasis added; footnote and internal citation omitted).

This case, like *Beacon Theatres,* involves a declaratory judgment action commenced by the party that, but for the existence of the declaratory judgment procedure, would have been the defendant. Although the action sounds in admiralty, that is only because National won the race to the courthouse door and made the Rule 9(h) designation first. *Beacon Theatres,* however, requires us to ignore National's status as the declaratory judgment plaintiff and to instead look to how the action otherwise would have proceeded. Without the declaratory judgment vehicle, Lockheed would have sued National for breach of the insurance

policy, a claim over which admiralty and "law" courts have concurrent jurisdiction. As the plaintiff, Lockheed would have been entitled under the saving-to-suitors clause to designate its claim as a legal one as to which there is a Seventh Amendment right to jury trial.

Contrary to National's contention, we do not believe that *Beacon Theatres* can be distinguished on the ground that it involved legal claims to which the Seventh Amendment applies, while this case involves admiralty claims as to which there is no Seventh Amendment right to a jury trial. Preliminarily, we note that, as explained above, it is an oversimplification to say that the Seventh Amendment does not apply in admiralty. While the Seventh Amendment is not applicable to an admiralty *claim*, it can be applicable to certain claims—those over which the "law" court has concurrent jurisdiction.

Moreover, it is rather circular to contend, as National effectively does, that *Beacon Theatres'* method for determining whether there is a right to a jury trial applies only in cases where there in fact is a right to a jury trial. "Actions for declaratory judgments are neither legal nor equitable, and courts have therefore had to look to the kind of action that would have been brought had Congress not provided the declaratory judgment remedy." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988); *see also Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643, 649 (7th Cir. 2002) ("If the declaratory judgment action does not fit into one of the existing equitable patterns but is essentially an inverted law suit-an action brought by one who would have been a defendant at common law—then

the parties have a right to a jury."(internal quotation marks omitted)). There is nothing in *Beacon Theatres* that suggests that this inquiry does not apply when the declaratory judgment action is brought in an admiralty case. The Court's decision in *Beacon Theatres* was driven by the need to protect Seventh Amendment rights. Because the Seventh Amendment is implicated in some admiralty cases (cases where there are claims that may be at law), we believe that the *Beacon Theatres* approach must be applied to such cases. *See, e.g., Wilmington Trust,* 934 F.2d at 1031-32 (applying *Beacon Theatres* to conclude that admiralty cross-claimant was entitled to a jury trial notwithstanding plaintiff's Rule 9(h) designation); *Sphere Drake,* 184 F.R.D. at 261 (same).

At issue in this case is a dispute over whether an insurer is obligated to indemnify its insured for damage sustained by an insured vessel. In the usual course of events—that is, without the declaratory judgment vehicle—Lockheed would have sued National for breach of the insurance contract. And under the saving-to-suitors clause, Lockheed would have been entitled to a jury trial on that claim. Accordingly, under *Beacon Theatres,* Lockheed cannot lose its right to a jury trial simply because National initiated the declaratory judgment action.

IV.

Because Lockheed is entitled to a jury trial, the district court erred by striking Lockheed's jury demand. We therefore grant Lockheed's petition for

the issuance of a writ of mandamus and we direct the district court on remand to try the case before a jury.

PETITION FOR WRIT OF MANDAMUS GRANTED

UNITED STATES COURT OF APPEALS
for the
FOURTH CIRCUIT

No. 06-1344
8:05-cv-01992-AW

[Filed September 27, 2007]

In Re: LOCKHEED MARTIN CORPORATION	)
	)
Petitioner	)
	)

JUDGMENT

Petitioner has filed a petition for a writ of mandamus.

The Court grants the petition

/s/ Patricia S. Connor
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No. AW-05-1992

[Filed February 21, 2006]

NATIONAL CASUALTY COMPANY)
Plaintiff,)
)
v.)
)
LOCKHEED MARTIN CORPORATION,)
Defendant.)

MEMORANDUM OPINION

WILLIAMS, District Judge.

National Casualty Company ("Plaintiff" or "National Casualty") brings this suit for declaratory judgment against Lockheed Martin Corporation ("Defendant" or "Lockheed Martin") to resolve a dispute concerning the scope of coverage of the insurance policy issued by Plaintiff for Defendant's vessel the M/V Sea Slice (the "Policy"). In particular, Plaintiff seeks a declaration from this Court that Defendant's claims for coverage under the insurance

policy are time-barred. In the alternative, Plaintiff asserts that even if these claims are not time-barred, this Court should enter judgment limiting the amount Defendant may recover under the Policy to $718,945 and declare that the Policy does not cover Defendant's administrative expenses and legal fees. Currently pending before the Court are Defendant Lockheed Martin's Motion for Judgment on the Pleadings [4] and National Casualty's Motion to Strike Defendant's Demand for a Jury Trial [6]. The Court has reviewed the entire record, as well as the pleadings with respect to the instant motions and has determined that no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2004). For the reasons stated more fully below, the Court will grant in part and deny in part Defendant's Motion for Judgment on the Pleadings and grant Plaintiff's Motion to Strike Defendant's Demand for a Jury Trial.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken in the light most favorable to Plaintiff. Plaintiff provided insurance coverage to Defendant for its vessel the M/V Sea Slice (the "Vessel") under Lockheed Martin's "Primary Marine Fleet Insurance Program."

The Policy contains two provisions regarding limitations on filing suit against National Casualty. Under Clause 5 of the Policy's "General Conditions":

> [t]he Underwriters agree that any action or proceeding against them for the recovery of any claim under or by virtue of this policy shall not

> be barred if commenced within the time prescribed therefore in the statutes of the State of New York.

(The Policy, General Conditions ¶ 5). The Policy sets forth a different statute of limitations in Clause 28, entitled "Suit Against Underwriters," which specifies:

> No action shall lie against Underwriters for the recovery of any loss sustained by the Assured unless such action is brought within one year after entry of any final judgment or decree in any litigation against the Assured, or in the event of a claim without the entry of such final judgment or decree, unless such action is brought within one year from the date of the payment of such claim, anything in this Policy, any law, ruling or statute of limitation to the contrary notwithstanding.

(The Policy, General Conditions ¶ 28).

Parties do not dispute that the Vessel sustained hull-and-machinery damage during a voyage from Hawaii to Alaska and that the Policy covered at least some of this damage. On July 30, 2001, the fuel in the Vessel became contaminated due to an improperly sealed fuel line cap, which caused seawater to leak into the fuel tank. The next day, the Vessel suffered a series of electrical, mechanical, and structural failures, which resulted in the engine room flooding. The ship's operators decided to curtail the M/V Sea Slice's maiden voyage and arranged to have the ship towed back to Hawaii for repairs on August 1, 2001. While mechanics performed the initial repairs, the Vessel sustained

more damage. It was involved in an allision[1] with another docked vessel on August 4, 2001, and the Vessel collided with its tug on August 15, 2001. The latter occurrence resulted in the engine room flooding yet again.

Defendant submitted an initial claim to Plaintiff for over $2 million for the damage to the Sea Slice. On July 21, 2003, Plaintiff issued a check to Defendant for $666,319, which Plaintiff believed represented the reasonable repair costs less applicable deductibles. Defendant, however, did not agree with Plaintiff's estimates of Defendant's losses and returned the check to Plaintiff uncashed.

Defendant then submitted a revised claim to Plaintiff on April 15, 2005 for $2,631,689. Two months after Defendant submitted the revised claim, Defendant's counsel wrote to Plaintiff to confirm that the statute of limitations under New York law applied to suits concerning the Policy. In response, Plaintiff filed suit in this Court on July 23, 2005, seeking a declaration that the one-year limitations period described in Clause 28, rather than the limitations period detailed in Clause 5 applied to this dispute. Plaintiff's Amended Complaint identifies its claim as a non-jury admiralty claim, pursuant to Rule 9(h) of

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[1] Allision is a term used in maritime law, and Black's Law Dictionary defines an allision as "[t]he sudden impact of a vessel with a stationary object such as an anchored vessel or a pier." Black's Law Dictionary (7th ed. 1999).

the Federal Rules of Civil Procedure.[2] On October 17, 2005, Defendant filed a Motion for Judgment on the Pleadings and its Answer to the Amended Complaint, in which it set forth a counterclaim for breach of contract predicated on this Court's diversity jurisdiction. Defendant made a demand for a jury trial on its counterclaim. On October 31, 2005, Plaintiff filed a response to Defendant's Motion as well as a Motion to Strike Defendant's Demand for a Jury Trial.

ANALYSIS

I. Defendant's Motion for Judgment on the Pleadings

Defendant requests that this Court grant it judgment on the pleadings, pursuant to Rule 12(c). Rule 12(c) provides that after the pleadings are closed, a defendant may present a defense of failure to state a claim upon which relief may be granted by a judgment on the pleadings. *See* Fed. R. Civ. P. 12(c), (h)(2). A motion for judgment on the pleadings is subject to the same standards as a Rule 12(b)(6)

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[2] Rule 9(h) provides that:

> A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims.

Fed. R. Civ. P. 9(h). In turn Rule 38(e) states that: "These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of 9(h)."

motion to dismiss. *See Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002); *Fare Deals, Ltd. v. Glorioso*, 217 F. Supp. 2d 670, 671 (D. Md. 2002). For such a motion, the court must deny the motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief." *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In determining whether to dismiss a complaint pursuant to Rule 12(c), this Court must view the well-pleaded material allegations in the light most favorable to the plaintiff and accept the factual allegations contained within the plaintiff's complaint as true. *See Flood v. New Hanover County*, 125 F.3d 249, 251 (4th Cir. 1997) (*citing Estate Constr. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.3d 213, 217-18 (4th Cir. 1994)); *Chisolm v. TranSouth Finan. Corp.*, 95 F.3d 331, 334 (4th Cir. 1996).

The Court, however, is "not bound to accept as true a legal conclusion couched as a factual allegation." *See Papasan v. Allain*, 478 U.S. 265, 286 (1986) (citing *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981)); *Young v. City of Mount Ranier*, 238 F.3d 567, 577 (4th Cir. 2001) (the mere "presence . . . of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6)"). Nor is the Court "bound to accept [Plaintiff's] conclusory allegations regarding the legal effect of the facts alleged." *United Mine Workers of Am. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085-86 (4th Cir. 1979); *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

Therefore, an action may be dismissed as a matter of law only if the complaint lacks a cognizable legal

theory *or* if it alleges insufficient facts to support a cognizable legal theory. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984) (citing 2A J. Moore, Moore's Federal Practice ¶ 12.08 at 2271 (2d ed. 1982)).

Defendant urges this Court to dismiss National Insurance's Amended Complaint because it argues that the limitations period in Clause 5, not Clause 28, applies to this action. In Clause 5, the parties agree that, in general, suits concerning the Policy must be brought within the limitations period set by New York law, which is six years for breach of contract actions. N.Y. C.P.L.R. § 213(2) (McKinney 2004). On the other hand, Clause 28 carves out an exception to this general rule and provides that certain suits must be brought within one year from the date the cause of action accrues.

To resolve this conflict, the Court must begin by looking to Maryland law.[3] Under Maryland law, insurance policies are interpreted in the same manner as contracts generally; and Maryland law does not adhere to the rule that an insurance policy should be construed most strongly against the insurer. *See*

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[3] When presented with choice-of-law questions, Maryland courts ordinarily follow the rule of *lex loci contractus,* which provides that the construction of a contract be determined by the law of the state where the contract was made. *Commercial Union Ins. v. Porter Hayden Co.*, 698 A.2d 1167, 1199 (Md. 1997); *Allstate Ins. Co. v. Hart,* 611 A.2d 100, 101 (Md. 1992). Parties seem to agree that the contract was made in Maryland, and that, therefore, Maryland law governs the interpretation of the insurance policy's provisions.

Collier v. MD-Individual Practice Ass'n, 607 A.2d 537, 539 (Md. 1992). As with all other contracts, a court must attempt to ascertain and give effect to the intentions of the parties at the time of contracting. *See Levy v. American Mut. Liab. Ins. Co.,* 73 A.2d 892, 894 (Md. 1995). To determine the parties' intent, the court must view the instrument as a whole, attributing to each word its normal or customary meaning, unless some indication exists that the parties intended to use words in a special technical sense. *See Kendall v. Nationwide Ins. Co.,* 702 A.2d 767, 771 (Md. 1996); *Sullins v. Allstate Ins. Co.,* 667 A.2d 617, 619 (Md. 1995); *Nolt v. United States Fidelity & Guar. Co.,* 617 A.2d 578, 584 (Md. 1993); *Collier,* 607 A.2d at 539. While the character of the contract, its object and purposes, and the factual circumstances of the parties at the time of execution may assist in interpreting the meaning of a particular contractual provision, clear and unambiguous language must be enforced as written. *See Dutta v. State Farm Ins. Co.,* 769 A.2d 948, 957 (Md. 2001); *Board of Trustees of State Colleges v. Sherman,* 373 A.2d 626, 629 (Md. 1977) ("where a contract is plain and unambiguous, there is no room for construction").

Plaintiff maintains that the Policy contains some ambiguity, asserting that the conditions of Clause 5 conflict with those of Clause 28. This Court, however, cannot agree. Clause 5 sets the statute of limitations for all actions to enforce the policy and states that: "The Underwriters agree that any action or proceeding against them for the recovery of any claim under or by virtue of this policy shall not be barred if commenced within the time prescribed therefore in the statutes of the State of New York." In contrast, Clause 28

concerns a special subset of these actions and provides that:

> No action shall lie against Underwriters for the recovery of any loss sustained by the Assured unless such action is brought within one year after entry of any final judgment of decree *in any litigation against the Assured,* or in the event of a claim without the entry of such final judgment or decree, unless such action is brought within one year from the date of the payment of such claim, anything in this Policy, any law, ruling or statute of limitation to the contrary notwithstanding.

(Emphasis added). The structure of this clause indicates that its provisions do not apply to any claim for loss, but only those claims related to "litigation against the Assured," or, in this case, litigation against Defendant. Once this primary condition is met, then Clause 28 operates to bar a suit against Plaintiff brought either one year after the entry of final judgment against Defendant or one year after Defendant settles or pays "such claim." From this language, Clause 28 unambiguously applies to claims that concern injured parties who bring litigation against the parties. The Clause does not apply to all losses that Defendant incurs for one of its insured vessels.

To interpret this provision as applying to all actions would render Clause 5 essentially meaningless. As Plaintiff notes in its opposition, any construction of a contract that makes another provision superfluous is generally disfavored. *See Baltimore Gas & Elec. Co. v.*

Commercial Union Ins. Co., 688 A.2d 496, 503 (Md. 1996) ("A contract must be construed as a whole, and effect given to every clause and phrase, so as not to omit an important part of the agreement.") (citing *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021, 1033 (Md. 1993)); *see also* 11 Richard A. Lord, Williston on Contracts § 32:5 (4th ed. 1992) ("An interpretation which gives effect to all provisions of the contract is preferred to one which renders a portion of the writing superfluous, useless or inexplicable"). In this case, if the Court were to accept Plaintiff's reading, Clause 5 would become surplusage. According to Plaintiff, any time National Casualty paid or attempted to pay a claim, Defendant would have one year within which to challenge this payment. Yet, Clause 5 explicitly provides "that any action or proceeding against [either party] for the recovery of any claim under the [P]olicy shall not be barred if commenced within the time prescribed therefore in the statutes of the State of New York."

Furthermore, even under Plaintiff's interpretation of Clause 28, it does not follow that Defendant's claim is time-barred. Assuming that "such claim" could refer to a claim by Defendant against Plaintiff for insured losses, Clause 28 still would not apply to this case because Plaintiff did not pay Defendant's claim. Defendant made a claim for more than $2 million, and Plaintiff sent Defendant a check for a portion of that amount. Defendant did not accept this check as payment, nor does this amount represent Defendant's entire "claim." Because the parties did not agree to a settlement and because Plaintiff did not send the sum that Defendant sought, the amount sent to Defendant was not a payment of Defendant's "claim." Therefore,

even if Plaintiff is correct that Clause 28 applies to this type of case, the Court nevertheless finds that Defendant's claim is not time-barred by this clause as a matter of law.

II. Plaintiff's Claim for Declaratory Judgment on the Scope and Amount of Reasonable Costs of Repairs

Plaintiff's Amended Complaint not only seeks a declaration regarding the limitations clauses, but also asserts that a controversy exists with respect to the scope of coverage and the cost of "reasonable" repairs to the Vessel. Defendant's arguments in favor of dismissing the Amended Complaint and those against striking its demand for a jury trial rest on its general assertion that the Amended Complaint merely attempts to deny Defendant's right to try its claim for insured losses before a jury. Yet, these arguments tend to conflate two conceptually distinct issues. A judgment on the pleadings against Plaintiff would preclude this Court or a jury from considering any of Plaintiff's remaining claims, but a judgment on Defendant's request for a jury trial would only determine whether a jury or a court should hear any part of the action. Therefore, this Court will address the threshold question of whether to dismiss the balance of the Amended Complaint before analyzing Plaintiff's Motion to Strike Defendant's Demand for a Jury Trial.

Although this Court has granted judgment in favor of Defendant with respect to Plaintiff's first claim, it remains unpersuaded that the balance of the Amended Complaint should be dismissed in its entirety. Plaintiff has averred that it disputes that the Policy's coverage

extends to some of the repairs that Lockheed performed on the Vessel. Such a dispute clearly qualifies as a case or controversy, and courts have entertained these types of actions, pursuant to their authority under the Declaratory Judgment Act, 28 U.S.C. § 2201. *See, e.g., Certain Underwriters at Lloyd's, London v. Sinkovich,* 232 F.3d 200 (4th Cir. 2000) (reviewing action for declaratory judgment brought by insurer concerning extent of hull insurance coverage); *Home Insurance Co. v. Pan American Grain Mfg. Co.,* 397 F.3d 12 (1st Cir. 2005) (insurer brought declaratory judgment action regarding scope of coverage of marine insurance policy); *Acadia Ins. Co. v. Allied Marine Transport LLC,* 151 F. Supp. 2d 107 (D. Me. 2001) (same).

Defendant has argued that the Supreme Court case of *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959) supports its position that this Court should dismiss the remainder of the Amended Complaint. In *Beacon Theatres,* the plaintiff sought declaratory relief against Beacon Theatres under the Sherman Antitrust Act and the Clayton Act. *Id.* at 502. Defendant Beacon Theatres demanded a jury trial of factual issues in the case, which the district court denied, reasoning that the factual disputes in the case were essentially equitable even though the defendant asserted a legal counterclaim. Reversing the Ninth Circuit, the Supreme Court granted Beacon Theatres' request for the issuance of a writ of mandamus, observing that the judge's determination of the common issues in trying the equitable claim, through collateral estoppel, might prevent a jury trial of defendant's counterclaim. *Id.* at 505. The Court held that in those circumstances neither statute nor the federal rules justified the

deprivation of the defendant's right to a jury trial. *Id.* at 508-509. Commentators and courts have cited this case in support of the proposition that a court may not try equitable issues of a case so as to infringe on a party's federal constitutional right to a jury trial. This case, however, does not hold that a court must dismiss an action for declaratory judgment brought pursuant to the district court's admiralty jurisdiction.

Nor does the other Supreme Court decision upon which Defendant relies, *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), have any bearing on the issues in this case. *Wilton* concerned the standard of review for a district court's decision to stay a declaratory judgment action during the pendency of parallel state court proceedings. *Id.* at 279. Since no parallel state court proceedings are pending, this case is inapposite. In sum, as the Amended Complaint sets forth a valid claim, pled with sufficient particularity to meet the requirements of Rule 8 of the Federal Rules of Civil Procedure, the Court will not exercise its discretion to dismiss the entire action.

III. Defendant's Right to A Jury Trial

The final motion before the Court, Plaintiff's Motion to Strike Defendant's Demand for a Jury Trial, raises a question that courts have struggled to resolve since the unification of admiralty and general civil procedure in 1966. When an admiralty plaintiff's right to a non-jury trial in an admiralty suit conflicts with a defendant's desire to have its legal counterclaims tried before a jury, which interest should yield?

In most civil cases, the Seventh Amendment guarantees either party the right to have a jury try issues of fact.[4] The Seventh Amendment, however, does not require a jury trial in a case based on claims in admiralty, and such claims ordinarily are tried to the court. *Fitzgerald v. United States Lines,* 374 U.S. 16, 20 (1963). Where a plaintiff has a cognizable claim under both admiralty and general federal jurisdiction, he may bring the action under the court's general jurisdiction or avail himself of admiralty procedures and remedies by designating his claim as one within the court's admiralty jurisdiction under Rule 9(h).[5] If the plaintiff chooses to proceed under the court's general civil jurisdiction, the right to trial by jury attaches. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355, 359-60 (1962). Whereas if

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[4] The Seventh Amendment provides that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. Amend. VII.

[5] The provision referred to as the "Savings to Suitors" clause permits a plaintiff to bring an admiralty suit under the federal court's general jurisdiction where a source of law other than maritime law would afford the plaintiff an alternate remedy. *See* 28 U.S.C. § 1333(1) ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled").

the plaintiff invokes Rule 9(h), he has the right to a bench trial.

While some courts have ruled that a plaintiff's decision to proceed under a federal court's admiralty jurisdiction prevents a defendant from seeking a jury trial on its counterclaims, others have held that the defendant has a right to a jury trial notwithstanding plaintiff's election to invoke the court's admiralty jurisdiction. *Compare Windsor Mount Joy Mutual Ins. Co. v. Johnson,* 264 F. Supp. 2d 158, 162 (D.N.J. 2003) (noting that plaintiff's decision to proceed under admiralty jurisdiction cannot be "undone" through the assertion of a counterclaim that is subject to the court's diversity jurisdiction); *St. Paul Fire & Marine Ins. Co. v. Holiday Fair,* 1996 WL 148350, at *2 (S.D.N.Y. April 2, 1996) (same); *Royal Ins. Co. of America v. Hansen,* 125 F.R.D. 5 (D. Mass. 1988) (same); *Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co.,* 90 F.R.D. 313, 317 (E.D.N.Y. 1981) (holding a "plaintiff's election to sue on an admiralty or maritime claim as the basis for federal jurisdiction binds the parties in the lawsuit to the inevitable procedural consequence of a court trial . . . even where a 'legal' counterclaim has been interposed."); *Arkwright Boston Manufacturers Mut. Ins. Co. v. Bauer Dredging Co.,* 74 F.R.D. 461 (S.D. Tex. 1977) (same) *with Wilmington Trust v. United States District Court for the District of Hawaii,* 934 F.2d 1026 (9th Cir. 1991) (ruling that when weighing a defendant's right to have his counterclaim tried before a jury under the Seventh Amendment and plaintiff's right to have a non-jury trial under maritime law, the defendant's Seventh Amendment right is paramount) *cert. denied,* 503 U.S. 966 (1992); *Koch Fuels, Inc. v. Cargo of*

13,000 Barrels of No. 2 Oil, 704 F.2d 1038, 1041 (8th Cir. 1983) (holding that trial court did not abuse its discretion by severing defendant's counterclaim from admiralty action and allowing counterclaim to be tried before a jury); *Sphere Drake Ins. PLC v. J. Shree Corp.*, 184 F.R.D. 258 (S.D.N.Y. 1999) (citing *Wilmington Trust* and ruling that a defendant had the right to have its counterclaim tried by a jury even though plaintiff identified the action as arising under admiralty law); *see also Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978) (concluding that a plaintiff's choice to proceed before the court under Rule 9(h) precluded a third-party defendant from invoking the right to a jury trial of its fourth-party complaint). A minority of jurisdictions have embraced the latter view, with the majority concluding that an admiralty plaintiff's right to a bench trial "trumps" the defendant's right to a jury trial of its counterclaim.

The case of *Windsor Mount Joy Mutual Insurance Company v. Johnson* illustrates the reasoning of the majority of courts confronting this issue. In that case, the plaintiff Windsor Mount Joy Mutual Insurance Company, invoking the admiralty jurisdiction of the court, sought declaratory judgment that it need not provide coverage under its policy with the defendant for the theft of an insured power-boat. *Windsor Mount,* 264 F. Supp. 2d at 159. The defendant answered the plaintiff's complaint and also asserted counterclaims against the plaintiff for breach of contract, indemnification, and breach of covenant of good faith and dealing. *Id.* at 160. The defendant's pleadings also included a demand for a jury trial. *Id.* After reviewing the relevant caselaw and noting the split in authority,

the District Court for the District of New Jersey granted the plaintiff's motion to strike. Although the *Windsor Mount* court observed that the Defendant would be entitled to a jury trial if he had brought an action before the plaintiff and demanded a jury trial, the court found that denial of plaintiff's motion to strike would "emasculate the election given to [the plaintiff] by Rule 9(h)." *Id.* at 163-64 (quoting *Harrison,* 577 F.2d at 987). This Court remains mindful of the consequences of curtailing a party's Seventh Amendment rights. Yet, permitting a defendant to have a jury trial on its counterclaim would vitiate a plaintiff's decision to bring a suit under Rule 9(h). This conclusion is consistent with that expressed by the Advisory Committee in their notes on the 1966 amendments to the Federal Rules of Civil Procedure:

> Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. § 1333) or by equivalent statutory provisions . . . One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute. It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. . . . Other methods of solving the

> problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

39 F.R.D. 69, 75-76 (1966).

Defendant relies on *Beacon* in support of its assertion that the Seventh Amendment protects its right to a jury trial on its counterclaim. The majority line of cases, decided well after *Beacon Theatres*, does not apply this decision in the admiralty context. *Beacon Theatres* examined the applicability of the Seventh Amendment when a court must decide both equitable and legal issues and held that neither statute nor the federal rules justified infringing on the defendant's Seventh Amendment rights. In an admiralty case, however, the Federal Rules expressly recognize that plaintiffs may elect under Rule 9(h) to have their cases tried before a judge. Furthermore, nearly half a century has passed since the Supreme Court handed down *Beacon Theatres*. If *Beacon Theatres* applied to admiralty suits, the Court's silence on this question appears inexplicable, especially in light of the numerous decisions that have held to the contrary. In these circumstances, this Court cannot adopt the position argued by Defendant that it has a right to a jury trial of its counterclaim.

Moreover, though Defendant's counterclaims can be characterized as compulsory, they concern the same legal issues as Plaintiff's Amended Complaint. Plaintiff seeks a declaration as to the scope of coverage of the Policy, and Defendant's counterclaim alleges that the claims it submitted to Plaintiff are covered by the Policy. That these counterclaims are intertwined with Plaintiffs's action militates in favor of striking Defendant's jury demand. *Cf. Royal Ins. Co.,* 125 F.R.D. at 9. To hold otherwise would enable any defendant to negate a plaintiff's election under 9(h) by asserting a counterclaim that merely represents the "flip-side" of the plaintiff's claim. Both *Wilmington Trust* and *Drake* involved counterclaims that raised issues apart from those pled in the complaints. For this and the reasons previously discussed, this Court will grant Plaintiff's Motion to strike, so as to give meaning to a plaintiff's right to a non-jury trial under Rule 9(h).

CONCLUSION

Therefore, this Court will GRANT *in part* and DENY *in part* Defendant's Motion for Judgment on the Pleadings. The Court will also GRANT Plaintiff's Motion to Strike Defendant's Demand for a Jury Trial. An Order consistent with this Opinion will follow.

Date: February 17, 2006

/s/
Alexander Williams, Jr.
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No. AW-05-1992

[Filed February 21, 2006]

NATIONAL CASUALTY COMPANY Plaintiff,	)
v.	)
LOCKHEED MARTIN CORPORATION, Defendant.	)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, dated February 17, 2006, IT IS this 17th Day of February, 2006, by the United States District Court for the District of Maryland, hereby **ORDERED**:

1. That Defendant Lockheed Martin's Motion for Judgment on the Pleadings [4] BE, and hereby IS, **GRANTED** *in part* and **DENIED** *in part*;

2. That the Amended Complaint, BE and hereby IS, **DISMISSED** in so far as the Amended Complaint alleges that Defendant's claims under the insurance policy are time-barred;

3. That the remaining portion of Defendant's Motion for Judgment on the Pleadings BE, and hereby IS, **DENIED**:

4. That Plaintiff's Motion to Strike Defendant's Demand for a Jury Trial [6] BE, and hereby IS, **GRANTED**; AND

5. That the Clerk of the Court mail a copy of this Order to counsel of record.

/s/
Alexander Williams, Jr.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1344
8:05-cv-01992-AW

[Filed October 23, 2007]

In re: LOCKHEED MARTIN CORPORATION, Petitioner.	)

On Petition for Rehearing and Rehearing En Banc

Respondent's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that is should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Traxler and Judge Gregory.

For the Court,

/s/ Patricia S. Connor
Clerk

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(4)

No. 07-948

FILED
MAR 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

NATIONAL CASUALTY COMPANY,

Petitioner,

v.

LOCKHEED MARTIN CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RULE 29.6 CORPORATE DISCLOSURE

Respondent Lockheed Martin Corporation has no parent corporation. The only publicly traded company that holds 10% or more of its stock is State Street Corporation.

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INTRODUCTION

This insurance-coverage dispute does not raise "a pure legal question of admiralty jurisdiction . . . as to which the circuits are in conflict." Pet. 5. It concerns declaratory-judgment procedure as to which there is *no* conflict among the circuits.

Since the Declaratory Judgment Act was passed in 1934, every circuit court to address the issue has ruled that a declaratory-judgment action cannot preempt the Seventh Amendment rights that the defendant would have enjoyed had Congress not created the declaratory-judgment action. In *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), all eight Justices participating in the case agreed that a declaratory-judgment action cannot be used to deprive a defendant of its Seventh Amendment right to try legal claims to a jury. In a declaratory-judgment action, whether a claim will be tried to a jury or the judge depends on how the case would have proceeded had there been no declaratory-judgment remedy.

The main pillar of the petition – the rule that the Seventh Amendment does not apply to admiralty cases, *see Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847) – is irrelevant in this case. The issue here is not the right of an admiralty plaintiff to designate its claim as "maritime" under Fed. R. Civ. P. 9(h), but rather the paramount rule that a declaratory-judgment action cannot override a constitutional jury-trial right. *Waring* was not a declaratory-judgment

case; when this Court decided *Waring*, declaratory relief was wholly unknown.

The circuit conflict on which petitioner relies concerns an issue that the Fourth Circuit explicitly announced it would not consider, *i.e.*, whether a claimant suing in admiralty under Rule 9(h) can deprive a counter- or cross-claimant of its jury trial right. Pet. App. 12a-15a. The Fourth Circuit explained, "We need not consider [that] issue[ ] because . . . *Beacon Theatres* requires a jury trial in this case, even if no counterclaims had been filed." *Id.* 15a.

On the issue that the Fourth Circuit actually decided, there is no conflict. No court of appeals has held that a plaintiff asserting a defensive "claim" for a declaration of non-liability can pre-empt the Seventh Amendment jury-trial right of the defendant, the true claimant, simply by bringing an action under the Declaratory Judgment Act and designating it as a maritime claim under Rule 9(h). This Court should therefore deny the petition.

STATEMENT OF THE CASE

The petition systematically disregards the fact that this is a declaratory-judgment action. Indeed, the question presented does not mention the declaratory-judgment nature of the action even though that was the basis on which the Fourth Circuit decided the case. Pet. App. 15a-18a.

Respondent's Insurance Claim. The Fourth Circuit outlined the most relevant facts leading to petitioner's pre-emptive claim for declaratory relief. Pet. App. 2a-4a. This case is a classic example of an insurer racing to the courthouse to preempt an insurance claim under a policy that it issued.

The true claimant in this "inverted" action is respondent, the policyholder. At issue is the amount of money that petitioner, the insurer, owes respondent for the hull-and-machinery losses sustained by respondent's vessel when it encountered high seas on an aborted voyage from Hawaii to Alaska. But for the Declaratory Judgment Act, respondent, the policyholder, would have filed suit under the policy to recover the vessel's hull-and-machinery losses. Indeed, petitioner did not file this declaratory-judgment action until after "[respondent] informed [petitioner] that it intended to file suit." Pet. App. 2a. Because petitioner raced to the courthouse first, respondent was forced to file a compulsory counterclaim to recover its insured loss.

Respondent's Jury-Trial Right. The Constitution, Art. III, § 2, provides that "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." In 1789, the First Congress enacted that "[t]he district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Judiciary Act of 1789, § 9, 1 Stat. 77. That provision,

as currently codified at 28 U.S.C. § 1333(1), gives district courts original jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*" The saving-to-suitors clause "was designed to protect remedies available at common law." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454 (2001). "Trial by jury is an obvious . . . example of the remedies available to suitors." *Id.* at 454-455. The jury-trial right is guaranteed by the Seventh Amendment.

Under the saving-to-suitors clause, maritime claimants are not compelled to proceed in admiralty but may pursue their common-law remedies under diversity jurisdiction. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 370 (1959); Pet. App 6a-7a. A claim for losses covered by a marine insurance policy is a *legal* claim subject to the saving-to-suitors clause of 28 U.S.C. § 1333(1) that can be tried before a jury in a state court or in a district court if there is diversity of citizenship between the parties.

In the ordinary course of events, as the Fourth Circuit notes, respondent would have sued petitioner under diversity jurisdiction and demanded the jury trial guaranteed by the Seventh Amendment. Pet. App. 16a-18a. Petitioner seeks to preempt that jury-trial right by filing the declaratory-judgment action and by designating its declaratory-judgment "claim" – *i.e.*, a determination of the amount owed under the policy – as a maritime claim under Rule 9(h). But as the Fourth Circuit has ruled, an insurer such as

petitioner cannot use a declaratory-judgment action as a sword to cut off the constitutional jury-trial right that the saving-to-suitors clause guarantees an insured such as respondent.

Marine insurers are not a special class of insurers at liberty to do what non-marine insurers cannot do. It is purposeless for amicus American Institute of Marine Underwriters to suggest that a judge rather than a jury must decide factual issues in claims under marine insurance policies lest the outcome of such claims somehow grow uncertain.[1] Holders of marine insurance policies cannot lose their constitutional right to have a jury decide the facts simply because marine insurers may collectively consider jury trials more burdensome than bench trials.

To be sure, as *Waring* recognized, the Seventh Amendment does not create a constitutional right to a jury trial in admiralty cases. Pet. 8. And in a conventional maritime case, as the Fourth Circuit recognized, a plaintiff suing in admiralty and designating its claim under Rule 9(h) would obtain a bench trial. In such cases, the saving-to-suitors clause would not grant the right to jury trial to a defendant that does not file a legal counterclaim. Pet. App. 12a.

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[1] The suggestion is also somewhat ironic in view of this Court's decision that marine insurance questions are routinely governed by state law. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316-317 (1955).

Petitioner asserts that the Fourth Circuit's ruling that respondent would be entitled to a jury trial even if it had not filed its compulsory counterclaim is at odds with that customary maritime rule. Pet. 8-9. Petitioner overlooks, however, the two-fold grounds for respondent's jury-trial demand and the fact the Fourth Circuit granted mandamus and ordered a jury trial based only on the second of those grounds, *i.e.*, the *Beacon Theatres* rule.

The Decision Below. As the Fourth Circuit states, respondent asserted a jury-trial right on two independent grounds. Pet. App. 8a. It first asserted that right based on the compulsory counterclaim filed in response to the declaratory-judgment complaint. Because "the parties are diverse and the amount-in-controversy requirement is satisfied," respondent asserted "the right under the savings-to-suitors clause to demand a jury trial on the counterclaim." *Id.*

In addition, respondent asserted an *alternative* jury-trial right based on *Beacon Theatres*, "in which the Supreme Court held that the right to a jury trial in a declaratory judgment action depends on whether there would have been a right to jury trial had the action proceeded without the declaratory-judgment vehicle." *Id.* 8a-9a. On that alternative ground, respondent's counterclaim was irrelevant because petitioner's declaratory-judgment action could not preempt respondent's jury-trial right whether or not respondent filed a counterclaim. The Fourth Circuit, applying *Beacon Theatres*, granted mandamus and

ordered a jury trial on that alternative ground. Pet. App. 15a-18a. No circuit decision or decision of this Court suggests it was wrong to do so.

- The Fourth Circuit did not decide the issue based on respondent's counterclaim.

In addressing respondent's counterclaim argument, the Fourth Circuit noted that "[g]enerally speaking, the right to determine whether a claim will proceed as an admiralty claim (without a jury) or as a common law claim (with a jury) belongs strictly to the plaintiff." Pet. App. 12a. "In cases involving counterclaims or cross-claims that could proceed at law," however, the court of appeals recognized, "courts are divided on the question of whether the plaintiff's Rule 9(h) admiralty designation prevents the defendant from obtaining a jury trial." *Id.* The Fourth Circuit then canvassed the authority reflecting the split between the circuits on *that* question, *i.e.*, whether counter- or cross-claimants can demand jury trial in an action commenced by the plaintiff under Rule 9(h) Pet. App. 12a-14a. *That* is the circuit conflict on which petitioner bases its petition for certiorari. The Fourth Circuit's decision, however, does not address that issue or implicate that conflict.

- The Fourth Circuit decided the issue based on the declaratory-judgment nature of the action.

The Fourth Circuit based its decision instead on the second prong of respondent's jury demand, *i.e.*, that *Beacon Theatres* requires a jury trial regardless of

respondent's counterclaim because of the declaratory-judgment nature of the action. As the Fourth Circuit ruled:

> We need not decide, however, whether the counterclaims asserted by Lockheed are "true" counterclaims, nor need we decide how a defendant's jury demand would be resolved if his counterclaims were not true counterclaims. We need not consider these issues because we agree with Lockheed that *Beacon Theatres* requires a jury trial in this case, even if no counterclaims had been filed.

Pet. App. 15a. After addressing the facts and reasoning of *Beacon Theatres*, the Fourth Circuit explained why *Beacon Theatres* was controlling:

> This case, like *Beacon Theatres*, involves a declaratory judgment action commenced by the party that, but for the existence of the declaratory judgment procedure, would have been the defendant. Although the action sounds in admiralty, that is only because National won the race to the courthouse door and made the Rule 9(h) designation first. *Beacon Theatres*, however, requires us to ignore National's status as the declaratory judgment plaintiff and to instead look to how the action otherwise would have proceeded. Without the declaratory judgment vehicle, Lockheed would have sued National for breach of the insurance policy, a claim over which admiralty and "law" courts have concurrent jurisdiction. As the plaintiff, Lockheed would have been entitled under the

> saving-to-suitors clause to designate its claim as a legal one as to which there is a Seventh Amendment right to jury trial.

Pet. App. 16a-17a. As the Fourth Circuit proceeded to explain, *Beacon Theatres* could not be distinguished on the grounds that petitioner had designated its claim for a declaratory judgment as a maritime claim. *Id.* 17a-18a. What is dispositive, the Fourth Circuit concluded, is the declaratory-judgment nature of the action, not petitioner's designation of its declaratory-judgment claim as a maritime claim under Rule 9(h):

> At issue in this case is a dispute over whether an insurer is obligated to indemnify its insured for damage sustained by an insured vessel. In the usual course of events – that is, without the declaratory judgment vehicle – Lockheed would have sued National for breach of the insurance contract. And under the saving-to-suitors clause, Lockheed would have been entitled to a jury trial on that claim. Accordingly, under *Beacon Theatres*, Lockheed cannot lose its right to a jury trial simply because National initiated the declaratory judgment action.

Id. 18a. That ruling – entirely consistent with *Beacon Theatres* and not suggestive of any conflict among the circuits – does not warrant review by this Court.

REASONS FOR DENYING THE PETITION

I. The Petition Ignores Long-Settled Authority Precluding Plaintiffs From Using The Declaratory-Judgment Procedure To Prevent Jury Trials.

The Declaratory Judgment Act. The Declaratory Judgment Act, Act of June 14, 1934, ch. 512, 48 Stat. 955, was originally codified at 28 U.S.C. § 274D (1934), and is now codified at 28 U.S.C. §§ 2201-02 (2006). It specifically preserved the right of jury trial for both parties. *See* original § 274D(3) ("When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.") That jury-trial right is now preserved in Fed. R. Civ. P. 57, 38, and 39.

The Uniform Declaratory-Judgment Jurisprudence. After the Declaratory Judgment Act was passed, numerous courts of appeals recognized without exception that in a declaratory-judgment action issues arising at law must be tried to a jury.[2] For

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[2] *See Aetna Cas. & Surety Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937) ("Where the issues raised in a proceeding for a declaratory judgment are of this [legal] nature, they must be tried at law if either party insists upon it, for the statute so provides. 28 U.S.C.A. § 400(3). And, irrespective of this provision of the statute, it is clear that the right of jury trial in what is

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example, in *Pacific Indemnity Co. v. McDonald*, 107 F.2d 446 (9th Cir. 1939), the court applied that rule specifically to an insurance company that filed a declaratory-judgment action against its insured in anticipation of a claim under the policy. "In such a proceeding," the court ruled, "although the parties are reversed in their position before the court, that is, the defendant has become the plaintiff, and vice versa, the issues are ones which in the absence of the statute for declaratory relief would be tried at law by a court and jury. In such a case we hold that there is an absolute right to a jury trial unless a jury has been waived." *Id.* at 448. That absolute jury-trial right remains the controlling rule.[3]

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essentially an action at law may not be denied a litigant merely because his adversary has asked that the controversy be determined under the declaratory procedure."); *United States Fidelity & Guaranty Co. v. Koch*, 102 F.2d 288, 291 (3rd Cir. 1939) (quoting *Aetna*); (*American*) *Lumbermens Mut. Cas. Co. v. Timms & Howard*, 108 F.2d 497, 499 (2d Cir. 1939) ("But it is quite clear that the declaratory judgment is not a means of evading trial by jury, and that jury trial may be had as of right in a declaratory action such as this which at bottom concerns the duty of the contract-obligor to pay money on the fulfillment of a condition.").

[3] *See also Piedmont Fire Ins. Co. v. Aaron*, 138 F.2d 732, 734 (4th Cir. 1943) (action on binder of insurance triable at law to a jury); *Hargrove v. Amer. Cent. Ins. Co.*, 125 F.2d 225, 228 (10th Cir. 1942) ("The procedural remedy afforded by the Declaratory Judgment Act is neither legal nor equitable, however its utilization does not alter or invade the right of trial by jury as at common law."); *Dickinson v. Gen. Accident Fire & Life Assur. Corp.*, 147 F.2d 396, 397 (9th Cir. 1945) ("In the absence of the procedure for declaratory relief it is plain that the issues here litigated could have been developed only in an action at law on

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Beacon Theatres. In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), this Court confirmed a defendant's right to try legal claims in a declaratory-judgment action to a jury. The plaintiff (Fox) asked for declaratory relief alleging anti-trust claims against defendant Beacon under the Sherman Act and the Clayton Act, and seeking injunctive relief. 359 U.S. at 502. Beacon counterclaimed and demanded a jury trial. *Id.* at 503. The threshold issue was whether Fox's complaint for declaratory relief stated legal claims triable to a jury. Both the majority and the dissent recognized the constitutional right to try legal claims in a declaratory-judgment action to a jury. As Justice Black stated for the Court:

> The District Court's finding that the Complaint for Declaratory Relief presented basically equitable issues draws no support from the Declaratory Judgment Act, 28 U.S.C.

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the policy. A party may not, merely by reversing the normal procedure, deprive his adversary of the right which would otherwise be his to have his case determined by a jury.") (citing *Pacific Indemnity*); *Johnson v. Fid. & Cas. Co. of N.Y.*, 238 F.2d 322, 324 (8th Cir. 1956) (same) (citing *inter alia* (*American*) *Lumbermens* and *Pacific Indemnity*); *Oklahoma Contracting Co. v. Magnolia Pipe Line Co.*, 195 F.2d 391, 396 (5th Cir. 1952) ("The constitutional right of a litigant to have a jury pass upon the facts in actions at common law is, of course, in no way modified or affected because demanded by a counter-claiming defendant in a declaratory judgment proceeding. Any party asserting rights in an action at common law, whether by complaint or counter-claim, in a declaratory judgment action or other proceeding, is entitled, upon demand, to have a jury pass upon any issue triable of right by a jury.").

> §§ 2201, 2202; Fed. Rules Civ. Proc., 57. See also 48 Stat. 955, 28 U.S.C. (1940 ed.) § 400. *That statute, while allowing prospective defendants to sue to establish their nonliability, specifically preserves the right to jury trial for both parties. It follows that if Beacon would have been entitled to a jury trial in a treble damage suit against Fox it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first.*

359 U.S. at 504 (emphasis added) (footnote omitted). Justice Stewart's dissenting opinion is no less emphatic, noting that in a "juxtaposition of parties" case the defendant has the right to try legal claims to a jury:

> Thus, if in this case the complaint had asked merely for a judgment declaring that the plaintiff's specified manner of business dealings with distributors and other exhibitors did not render it liable to Beacon under the antitrust laws, this would have been simply a "juxtaposition of parties" case in which Beacon could have demanded a jury trial.

359 U.S. at 515 (Stewart, J., dissenting).[4] It is therefore the blackest of blackletter law that a plaintiff

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[4] In a footnote, Justice Stewart elaborated:

> "Transposition of parties" would perhaps be a more accurate description. *A typical such case is one in which a plaintiff uses the declaratory judgment procedure to seek a determination of nonliability to a legal*

(Continued on following page)

insurer cannot – by pre-emptively seeking a declaration of non-liability – deprive its insured of the right to try its legal claims based on its policy rights to a jury.[5]

II. There Is No Circuit Conflict Concerning Declaratory-Judgment Actions.

A. The Fifth Circuit decision in *Harrison* presents no conflict.

The Fifth Circuit decision that petitioner and amicus Maritime Law Association cite as being in

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claim asserted by the defendant. The defendant in such a case is, of course, entitled to a jury trial.

Beacon Theatres, 359 U.S. at 515 n.7 (Stewart, J., dissenting) (emphasis added). In modern terms, this is an "inverted lawsuit" in which the true defendant is the declaratory-judgment plaintiff and the true claimant is the defendant.

[5] In *Beacon Theatres*, the Court also considered whether the plaintiff had asserted an equitable claim for injunctive relief that would have priority over the legal anti-trust claims. 359 U.S. at 504-506. The Court ruled that Fox's equity-based claims could not deprive Beacon of its jury-trial right. *Id.* at 508-511. Its holding was "consistent with the plan of the Federal Rules and the Declaratory Judgment Act to effect substantial procedural reform while retaining a distinction between jury and nonjury issues and leaving substantive rights unchanged." *Id.* at 508-509. Furthermore, the Court emphasized the narrowness of a district court's discretion to give equitable non-jury claims priority over legal jury-right claims. "Since the right to jury trial is a constitutional one," the Court noted, "while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Id.* at 510; *see also* Pet. App. 14a (quoting the "wherever possible" admonition).

conflict, *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978), *see* Pet. 9-11, is not a declaratory-judgment action and its facts are not analogous to an "inverted" lawsuit in which an insurer such as petitioner steals a march on its insured, the true claimant, through a preemptive declaratory-judgment action.

In *Harrison*, an injured longshoreman sued a vessel owner which then impleaded the stevedore that employed the plaintiff. In his original complaint and later in the amended complaint against all parties, the plaintiff designated his claims as admiralty and maritime claims under Rule 9(h). *Harrison*, 577 F.2d at 973. The stevedore in turn filed a fourth-party complaint against the shipper (Rohm and Haas) of the product that injured the plaintiff. After a bench trial, the district court granted Harrison judgment against Rohm and Haas, which appealed *inter alia* on the grounds that it had been deprived of a right to a jury trial.

On those facts, the Fifth Circuit "refuse[d] to permit a third-party defendant to emasculate the election given to the plaintiff by Rule 9(h) by exercising the simple expedient of bringing in a fourth-party defendant. *Id.* at 987. The fourth-party complaint was based on the same set of operative facts that gave rise to the first complaint. *Id.* The plaintiff had amended his complaint to state a claim directly against Rohm and Haas pursuant to Rule 9(h). *Id.* And the plaintiff had not alleged diversity as an alternative basis of jurisdiction. *Id.* None of these factors concerns an

insurer's use of declaratory-judgment procedure to deprive the true claimant, the insured, of its jury-trial right. Petitioner therefore has no grounds for asserting that "[a]pplying the Fifth Circuit's rule to this case, petitioner would prevail." Pet. 10-11. *Harrison* bears no resemblance to the present case.

B. The Eighth and Ninth Circuit decisions do not suggest a conflict.

Petitioner is wrong to suggest that *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1041-42 (8th Cir. 1983), and *Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026, 1032 (9th Cir. 1991), align with the decision below in this conflict because, like *Harrison*, these decisions do not concern declaratory-judgment procedure. These decisions concern the circuit conflict over counter- and cross-claims that the Fourth Circuit did not decide. *See supra* at 7; Pet. App. 12a-15a. Both decisions nonetheless hold that a plaintiff, by designating its claim under Rule 9(h), cannot deprive a defendant counterclaimant of its constitutional jury-trial right.

The Fourth Circuit considered these decisions when addressing the cases concerning legal counter- and cross-claims. Pet. App. 12a-14a. But it did not base its result on those decisions, relying instead on the controlling *Beacon Theatres* rule that rendered respondent's counterclaim irrelevant. *Id.* 15a-18a.

C. District Court decisions are not persuasive.

Only a few district court decisions have reached a result contrary to the decision below and permitted an insurer to invoke Rule 9(h) in a declaratory-judgment action and thereby trump an insured's right to try its counterclaim to a jury. Pet. 14-15. It would be premature for this Court to address these district court decisions before any court of appeals has reached a result contrary to the decision below and thus created an inter-circuit conflict.

In any event, these district court decisions rely almost exclusively, and superficially, on Rule 9(h), without examining the origins of the Declaratory Judgment Act, the numerous circuit decisions holding that a plaintiff cannot use declaratory-judgment procedure to deprive a defendant of its jury right, and this Court's reasoning in *Beacon Theatres* (in both the majority and dissenting opinions) that a declaratory-judgment action cannot defeat a declaratory-judgment defendant's right to try legal claims to a jury. This Court should give the respective courts of appeals an opportunity to review some of these ill-considered decisions (if the district courts in question even adhere to them). If the courts of appeals do not correct the error, and thus an inter-circuit conflict were to develop, this Court may wish at that time to address the problem that would then exist.

III. The Fourth Circuit's Rule Is Not Inconsistent With This Court's Precedent And The Federal Rules.

A. *Waring* does not preclude the Fourth Circuit's decision.

Petitioner claims that *Waring* precludes the Fourth Circuit's decision (Pet. 15-18), but it fails to address the fact that *Waring* does not concern declaratory-judgment procedure and therefore does not sanction an insurer's use of Rule 9(h) in a declaratory-judgment action to defeat its insured's jury-trial right. Furthermore, petitioner ignores the fact that "[w]hile this Court has held that the Seventh Amendment does not require jury trials in admiralty cases, neither that Amendment nor any other provision of the Constitution forbids them." *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963) (citing *Waring*) (footnotes omitted).

As petitioner notes, Pet. 16, *Waring* concerns a defendant's assertion that the saving-to-suitors clause carved out of admiralty jurisdiction cases triable at common law. This Court rejected that assertion because the Seventh Amendment does not extend to admiralty claims and the saving-to-suitors clause therefore does not restrict a federal court's admiralty jurisdiction or require jury trials in admiralty cases. *Waring*, 46 U.S. at 460-461. That the Seventh Amendment does not require admiralty claims to be tried to juries is not the issue here. What is at issue, what is dispositive, and what petitioner steadfastly ignores, is the long-settled rule that

plaintiffs cannot use declaratory-judgment actions to trample jury-trial rights. And what the Declaratory Judgment Act, all court-of-appeals decisions applying that Act, and *Beacon Theatres* make plain is that in an "inverted" declaratory-judgment action – in which the defendant is the true claimant – the *defendant's* jury-trial right prevails. *Waring* does not speak to *that* issue, and is therefore irrelevant.

B. The Federal Rules do not preclude the Fourth Circuit's decision.

According to petitioner, Pet. 19, "[t]he Fourth Circuit's opinion allows a defendant in a declaratory judgment action in admiralty to eviscerate a plaintiff's right to a non-jury trial under Rule 9(h) and Rule 38(e) of the Federal Rules of Civil Procedure, contrary to the intent of those rules and historical admiralty practice and procedures." But petitioner cites no evidence suggesting that Rules 9(h) and 38(e) were ever intended to govern declaratory-judgment actions, much less alter the settled rule that a plaintiff cannot use the Declaratory Judgment Act to deprive a defendant of its jury-trial right.

Petitioner also ignores Rule 38(a), providing that the "right of trial by jury as declared by the Seventh Amendment to the Constitution . . . shall be preserved to the parties inviolate." That Rule is consistent with the Declaratory Judgment Act and also informs the *Beacon Theatres* principle that a district court in a declaratory-judgment action must exercise

its discretion to preserve jury trial "wherever possible." *Beacon Theatres*, 359 U.S. at 508-510 (citing Rule 38(a)).

Petitioner's assertion, Pet. 21-22, that Rules 9(h) and 38(e) do not "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072, changes nothing. This Court's rule-making power does not abridge a paramount constitutional right.

C. The Fourth Circuit correctly relied on *Beacon Theatres*.

Petitioner seeks to distinguish *Beacon Theatres* on the grounds that it "involves neither admiralty jurisdiction nor the plaintiff's election under Rule 9(h) to proceed in admiralty without a jury trial." Pet. 22. That assertion is just one more manifestation of petitioner's refusal to address the declaratory-judgment nature of the action.

As the Fourth Circuit succinctly concludes, Pet. App. 18a, *Beacon Theatres* is controlling because it recognizes that if a claimant has a constitutional jury-trial right, it cannot lose that right simply because its adversary initiates a declaratory-judgment action. Under *Beacon Theatres*, a court must determine whether the defendant would have had a jury-trial right if there were *no* declaratory-judgment remedy. And if the defendant would have had a jury-trial right, it cannot lose that right simply because the plaintiff initiated the declaratory-judgment action. That longstanding rule does not lose force

when an insurer such as petitioner initiates a declaratory-judgment action against its insured under the district court's admiralty jurisdiction.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

NATIONAL CASUALTY COMPANY,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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April 9, 2008

RULE 29.6 DISCLOSURE

Petitioner's disclosure pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that disclosure.

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REPLY BRIEF FOR PETITIONER

This is an admiralty case in which admiralty jurisdiction and its procedures were invoked by the plaintiff (Petitioner here) as the basis upon which the district court could exercise jurisdiction. The question presented is whether, after a plaintiff elects to file a case in admiralty (and hence proceed without a jury), a defendant can nullify that election by filing a counterclaim and demanding a jury trial. There is a clear conflict among the circuits on this issue – acknowledged by the Fourth Circuit, by The Maritime Law Association of the United States, and by recent case law – that this Court should resolve.

Respondent puts the cart before the horse in its characterization of this case first as a declaratory judgment case and only secondarily as an admiralty case. The first question that must necessarily be answered is whether this case is one in admiralty or at law. When a claim can properly support either form of jurisdiction, the overwhelming tradition in American law has been to afford the choice to the party filing the case. Indeed, before the unification of admiralty courts and common law courts, the choice was literally *where* – in what court – to file the case. And, as set out below, the existing rules of procedure were intended to preserve that traditional practice. It has long been settled that, when a case is filed in admiralty, the Seventh Amendment right to trial by jury does not apply. Thus, contrary to Respondent's contentions, *Beacon Theatres* and other cases that turn on the application of the Seventh Amendment in *non-admiralty* cases are simply inapplicable here.

The question of whether a plaintiff's designation of a claim as one subject to admiralty jurisdiction is inviolable, even when an alternate basis for jurisdiction could have been invoked, was decided by this Court in *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847), and by the Fifth Circuit in *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978). The Fourth Circuit's decision in this case conflicts with those decisions, as do the decisions of the Ninth Circuit in *Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026 (9th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992), and the Eighth Circuit in *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038 (8th Cir. 1983).

Because the issue presented is of recurring significance, this Court should resolve that conflict.

I. THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS AS TO WHETHER A DEFENDANT CAN NULLIFY A PLAINTIFF'S ELECTION TO FILE A DUAL-JURISDICTION CASE IN ADMIRALTY AND PROCEED WITHOUT A JURY

In filing this case, National Casualty Company relied upon admiralty jurisdiction and its procedures, even though there was an alternative basis for federal jurisdiction. Its decision to seek a declaratory judgment, on the other hand, was not jurisdictional – nor was it "unconventional" – it was simply a remedy available to it within admiralty jurisdiction.

The Fourth Circuit's decision to grant a writ of mandamus to Respondent, and to direct the district

court to try this case before a jury, conflicts both with the Fifth Circuit's decision in *Harrison* and with this Court's decision in *Waring*. The Fourth Circuit's decision also conflicts with the Federal Rules of Civil Procedure, specifically Rules 9(h) and 38(e). Finally, it conflicts with the vast majority of district court decisions that have addressed this issue, including many declaratory judgment actions. The Fourth Circuit even acknowledged that the courts are split on the central issue in this case – whether a defendant may override a plaintiff's election, pursuant to Rule 9(h), to proceed in admiralty without a jury. *See* App. 12a-14a.

A. The Fourth Circuit's Decision Conflicts With *Harrison*

The *Harrison* decision upholds the rule that, when the same transaction or occurrence gives rise to a controversy that includes opposing claims by two or more parties that could be brought either in admiralty or at law, the election to proceed with or without a jury rests with the plaintiff under Rule 9(h). In its Brief in Opposition, Respondent contends that the Fourth Circuit's decision below is not in conflict with *Harrison*, because *Harrison* does not involve a declaratory judgment action. Contrary to Respondent's arguments, there is a clear conflict between the two circuits' decisions, and this conflict is demonstrated by a recent decision of the United States District Court for the Middle District of Florida, *Great Lakes Reinsurance (UK) plc v. Masters*, No. 8:07-cv-1662-T-24-MSS, 2008 WL 619342 (M.D. Fla. Mar. 3, 2008).

In *Great Lakes*, the insurer of a yacht filed a declaratory judgment action seeking a declaration that

it was not responsible for compensating the yacht's owner for damage to the vessel. The yacht owner filed a breach of contract counterclaim, alleging diversity jurisdiction and demanding a jury trial. In opposing a motion to strike the demand for jury trial, the yacht owner relied upon the Fourth Circuit's decision in this case. The court, saying that the *Harrison* decision was binding on it, granted the motion to strike:

> At issue in this motion is whether a defendant who has filed a counterclaim based on diversity jurisdiction may demand a jury trial when the plaintiff first filed an admiralty suit in federal court pursuant to Federal Rule of Civil Procedure 9(h). Masters argues that he has a Seventh Amendment right to have his breach of contract claim heard by a jury. Further, Masters argues that Great Lakes has undertaken "procedural fencing" to preclude Masters of his right to a jury trial. Masters' arguments are based largely on cases from the Fourth and Ninth Circuit Courts of Appeal. *See In Re: Lockheed Martin Corporation*, 503 F.3d 351 (4th Cir. 2007) (finding the plaintiff's designation of its declaratory judgment claim as an admiralty claim did not prevent the defendant from obtaining a jury trial on its counterclaim that arose at law); *see also Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026 (9th Cir. 1991) (finding that a defendant's right to jury trial on its counterclaim trumps a Rule 9(h) election by a plaintiff if the defendant alleges an independent basis for jurisdiction). The cases Masters cites clearly articulate that the

> Seventh Amendment right to a jury trial trumps a plaintiff's Rule 9(h) election of a bench trial, but these non-binding cases are at odds with a case binding on this Court, *Harrison v. Flota Mercante Grancolombiana, S. A.*, 577 F.2d 968 (5th Cir. 1978).
>
> . . . .
>
> After careful consideration, the Court finds that Great Lakes' election to proceed in this declaratory action without a jury pursuant to Rule 9(h) trumps Masters' demand for a jury trial on his counterclaim.

Great Lakes, 2008 WL 619342, at *1-*2. Given that district court's acknowledgement of the conflict, there is no great judicial efficiency to be gained by further percolation of this issue. Whichever way the Eleventh Circuit might go in any appeal out of the *Great Lakes* case, it will only deepen the conflict, not resolve it.

B. The Fourth Circuit's Decision Conflicts With *Waring*

This Court in *Waring v. Clarke* held that the Seventh Amendment does not apply to admiralty cases, even when there is concurrent jurisdiction with the law side of the court under the "saving-to-suitors" clause, because there was nothing in the Constitution from which it could be inferred that suits in admiralty, being civil causes rather than common law causes, were ever to be tried to a jury. 46 U.S. at 460. The *Waring* Court also rejected the argument that the saving-to-suitors clause provided the defendant a right to a jury trial in an admiralty case. *Id.*

at 460-61. The *Waring* decision therefore stands for the proposition that the saving-to-suitors clause does not enable a defendant to force a trial by jury when the plaintiff has filed the suit in admiralty.

Now, with the decision below, a defendant in a declaratory judgment action filed in admiralty in the Fourth Circuit for which there is also diversity jurisdiction would be required only to demand a jury trial, which will thereby "force the plaintiff into a common law court" (*id.* at 461), and the Seventh Amendment will "be converted into an inhibition upon the mode of trial in suits which are not exclusively suits at common law" (*id.* at 460). *Waring* explicitly precludes that result. While Respondent argues that this Court's decision in *Waring* is "irrelevant," such an argument actually underscores the conflict that exists between *Waring*, on the one hand, and the Fourth Circuit's and Respondent's interpretation of *Beacon Theatres*, on the other.

C. The Fourth Circuit's Decision Conflicts With Traditional Admiralty Practice, Which The Current Rules Were Intended To Preserve

The Fourth Circuit's decision also conflicts with the plain language and intent of Rules 9(h) and 38(e) of the Federal Rules of Civil Procedure. Rule 9(h) allows a plaintiff in an action in which there is admiralty jurisdiction and some other ground for jurisdiction to identify the claim as an admiralty and maritime claim for the purposes of, among others, Rule 38(e). Rule 9(h), Federal Rules of Civil Procedure (2005). Rule 38(e), in turn, provides that: "These rules [including Rule 57] shall not be construed to

create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)." Rule 38(e), Federal Rules of Civil Procedure (2005).

The Advisory Committee Note relating to the 1966 amendment to Rule 9, which added Rule 9(h), clarifies that, after the unification of the Admiralty Rules and the Federal Rules of Civil Procedure, a jury trial will not be imposed in cases in which it was not available before the unification:

> Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. . . .
>
> It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. . . . The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear.
>
> . . . .
>
> . . . [T]he preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement

> in his pleading to the effect that the claim is an admiralty or maritime claim.

Rule 9, Federal Rules of Civil Procedure, Advisory Committee Notes – 1966 Amendment. 39 F.R.D. 69, 75-76 (1966).

The adoption of Rules 9(h) and 38(e) preserved the historical maritime right and practice of trying cases filed on the admiralty side of a federal court without a jury. The Fourth Circuit's decision below conflicts with this important and historical admiralty right and practice, and this Court should grant this petition for writ of certiorari, so that it may review that decision.

II. A DECLARATORY JUDGMENT ACTION IS NOT IMMUNE FROM THE RULE THAT A JURY TRIAL IS NOT AVAILABLE IN ADMIRALTY

That this case was filed as a declaratory judgment action cannot overcome the fact that the jurisdictional basis for this action, and the procedures invoked by the plaintiff upon filing this action, was the admiralty and maritime jurisdiction of the federal court.

Prior to 1961, it was not clear that a declaratory judgment action could be entertained in admiralty. After the enactment of the Declaratory Judgment Act in 1934, some courts questioned whether the declaratory judgment remedy was available in cases filed in admiralty. *See Streckfus Steamers v. Mayor of Vicksburg*, 81 F.2d 298, 299 (5th Cir. 1936) ("[I]t is at least doubtful whether courts of admiralty are within the new act."); *McLain v. Lance*, 146 F.2d 341, 343 (5th

Cir. 1944) ("Likewise there is much uncertainty as to whether or not a court of admiralty is authorized to render a declaratory judgment."), *cert. denied*, 325 U.S. 855 (1945). By the 1950s, however, the trend in the courts seemed to be in favor of declaratory judgment actions being cognizable in admiralty. *See, e.g., American-Foreign S.S. Corp. v. United States*, 291 F.2d 598, 604 (2d Cir.) ("Furthermore, the wording of the Declaratory Judgment Act makes it broadly applicable to 'any court of the United States' which would include, presumably, the admiralty courts."), *cert. denied*, 368 U.S. 895 (1961); *Providence Washington Ins. Co. v. Lovett*, 119 F.Supp. 371 (D.R.I. 1953) (declaratory judgment action in admiralty as to a yacht hull policy).* *Cf. States Marine Lines, Inc. v. United States*, 196 F.Supp. 562, 563 (N.D. Cal. 1960) ("Whatever the merit of the contention that declaratory judgment proceedings ought to be available in admiralty action, that proposition does not seem supported by past decisions.").

In 1961, the Advisory Committee recommended that the Admiralty Rules be amended by adding, *inter alia*, a new rule dealing with declaratory judgments. As to its reason for making that recommendation, the Advisory Committee stated:

> The summary judgment and the declaratory judgment are generally regarded, and are regarded by the Committee, as valuable features of a modern procedural system which should be available in admiralty as well as in civil cases.

---

* As all of these cases were in admiralty, they necessarily were tried without a jury.

29 Moore's Fed. Prac. § 701.04[3] (3d ed. 2008) (quoting Advisory Committee's Reasons for Recommending Rule 58 Authorizing Summary Judgments, and Rule 59 Authorizing Declaratory Judgments).

Following that recommendation, this Court enacted Admiralty Rule 59, which was essentially identical to Rule 57 of the Federal Rules of Civil Procedure. Critically, the Advisory Committee Notes to Admiralty Rule 59 made clear, two years after *Beacon Theatres* was decided, that the allowance of a declaratory remedy in the admiralty courts was in no way intended to alter the traditional admiralty practice of trial before the court:

> In general, of course, there is no right to jury trial in admiralty, and the adoption of this rule will confer no such right. In a narrowly defined class of admiralty cases, however, a statutory right to jury trial has existed since 1845. *See* 28 U.S.C. §1873 (the "Great Lakes Act"), derived from 5 stat. 726-27. Although the matter may be of limited practical importance, it seems appropriate to preserve the reference to jury trial in this rule because of the existence of the statutory right, more so since preservation of the reference preserves uniformity as between this rule and the corresponding civil rule.

29 Moore's Fed. Prac. § 701.04[3] (3d ed. 2008) (quoting Advisory Committee Notes).

After Admiralty Rule 59 came into effect, the courts sitting in admiralty handled a wide range of declaratory judgment actions – all without a jury.

See, e.g., Marine Transp. Lines, Inc. v. Nunes, 211 F.Supp. 156 (N.D. Cal. 1962) (libel by an employer against employees with maritime attachment); *Brunson v. Iowa Home Mut. Cas. Co.*, 224 F.Supp. 592 (S.D. Ala. 1963) (stevedore's declaratory judgment action against its liability insurer); *Shinnihon Kisen, K.K. v. Jarka Corp.*, 1964 A.M.C. 1455 (D. Mass. 1964) (vessel owner action against a stevedore seeking declaratory judgment for defense and indemnity); *Risdal v. Universal Ins. Co.*, 232 F.Supp. 472 (D. Mass. 1964) (declaratory judgment action brought by insured against insurer under a marine hull policy); *Cia Aeolia de Naveg. S.A. Panama v. John T. Clark & Son of Boston, Inc.*, 250 F.Supp. 808 (D. Mass. 1964) (vessel owner seeking declaratory judgment for defense and indemnity from a stevedore).

In 1966, of course, the Admiralty Rules were merged with the Federal Rules of Civil Procedure, and Admiralty Rule 59 was rescinded in favor of Rule 57 of the Federal Rules of Civil Procedure, which referenced Rule 38, which now included Rule 38(e). Thus, when the existing admiralty practice of addressing declaratory judgment actions under Admiralty Rule 59 was merged into the similar practice under Rule 57 of the Federal Rules of Civil Procedure, the practice of these cases being tried before the court, without a jury, was preserved. *See, e.g., Insurance Co. of Pennsylvania v. Amaral*, 44 F.R.D. 45, 46-47 (S.D. Tex. 1968).

To the extent the Fourth Circuit's decision below stands for the proposition, as Respondent maintains, that declaratory judgment actions are an exception to the rule articulated in *Waring* and in *Harrison*, it is

plainly in conflict with the history of declaratory judgment practice in admiralty. That is a conflict that this Court should resolve.

CONCLUSION

The petition for writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

NATIONAL CASUALTY COMPANY,

Petitioner,

—v.—

LOCKHEED MARTIN CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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AMERICAN INSTITUTE OF MARINE UNDERWRITERS' BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

The American Institute of Marine Underwriters ("AIMU") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by National Casualty Company ("National Casualty").

INTEREST OF *AMICUS CURIAE*[1]

AIMU is a non-profit trade association representing the ocean marine insurance industry in the United States as an advocate, source of information and center for education. (*see* www.aimu.org). AIMU represents 49 marine insurance companies in the United States. Those companies underwrite the vast majority of the ocean marine risks insured in the United States.

The risks insured by AIMU's members include physical damage to vessels under hull and machinery insurance policies, such as the insurance policy at issue in this case. In 2006, AIMU's members underwrote marine insurance policies

[1] Pursuant to Supreme Court Rule 37.6. *amicus curiae* declares that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of the *amicus curiae*'s intention to file this brief at least 10 days prior to the due date.

with collective total premiums of approximately $2.5 billion.

AIMU works in conjunction with the United States government and international groups to monitor and ameliorate the legal environment for the marine insurance industry and the broader maritime industry generally. AIMU is the forum for action on the important and timely issues that affect United States marine insurers, reinsurers and the maritime community at large.

This brief focuses on the key issue presented in the petition for a writ of certiorari: whether an insured can nullify a marine insurer's right to have a dispute under a marine insurance policy heard by a federal judge under the federal courts' admiralty jurisdiction. The resolution of this question is of major significance to all participants in maritime commerce, not just marine insurers.

Those insurers (the members of AIMU), however, provide critical support for the maritime industry; without the insurance underwritten by AIMU's members, vessel owners, shippers of cargoes and other participants in the maritime industry would simply be unable to operate. AIMU supports National Casualty's petition for a writ of certiorari because the resolution of this case will directly and significantly impact AIMU's members. The Court has the opportunity in this case to resolve a conflict among the Circuits and to clarify whether, upon the election by a plaintiff to invoke the federal courts' admiralty jurisdiction and its procedures, all related claims by a defendant must be tried to the court, without a jury.

Uniformity and consistency in maritime law has traditionally been achieved via bench trials conducted by federal judges who are knowledgeable in the subject area of maritime law. Having lay juries deciding marine insurance issues at the election of a defendant threatens to erode the uniformity that results from resolution through federal bench trials in maritime cases.

AIMU therefore has a keen interest in the resolution by this Court of the essential issue in this case, and AIMU urges the Court to grant National Casualty's petition.

STATEMENT

The underlying facts are set forth in National Casualty's petition and are therefore only briefly summarized here. In July 2001, the M/V SEA SLICE, a vessel owned by respondent Lockheed Martin, sustained damage approximately 130 miles from Honolulu, Hawaii while enroute to Anchorage, Alaska. Following an investigation, National Casualty determined that there was probable coverage under their policy and National Casualty paid the reasonable cost of repairs as required by the policy. Lockheed Martin objected to the amount of the payment and demanded an additional payment. The parties were unable to agree on the extent of the covered loss, and National Casualty therefore filed a complaint for a declaratory judgment in the United States District Court for the District of Maryland, invoking the court's admiralty jurisdiction.

Following the filing of an amended complaint by National Casualty, Lockheed Martin filed an

answer in which it admitted that both diversity jurisdiction and admiralty and maritime jurisdiction existed, but Lockheed Martin also counterclaimed, demanding a trial by jury.

National Casualty subsequently filed a motion to strike Lockheed Martin's demand for a jury trial, and the District Court granted that motion. Lockheed Martin responded by filing a petition for writ of mandamus with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit granted the petition for writ of mandamus and directed "the district court on remand to try the case before a jury." *In re Lockheed Martin Corp.*, 503 F.3d 351, 360 (4th Cir. 2007).

While the Fourth Circuit held that the Seventh Amendment "applies only to cases *at law*, a category that does not include *maritime* cases," and that "the Seventh Amendment creates no constitutional right to a jury trial of maritime claims," *Id.* at 354, (citing *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847) and *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963) (emphasis by the court)), it nonetheless concluded that Lockheed Martin was entitled to a jury trial, "even if no counterclaims had been filed." *Lockheed Martin Corp.*, 503 F.3d at 358.

On October 23, 2007, National Casualty's petition for rehearing en banc or for panel rehearing was denied. National Casualty's petition for a writ of certiorari followed.

ARGUMENT

The Fourth Circuit's decision is in conflict with decisions of several other circuits that have held that defendants have no right to a jury trial in admiralty. *See, e.g., Complaint of Consolidation Coal Co.*, 123 F.3d 126, 134 (3rd Cir. 1997), *cert. denied*, 532 U.S. 1054 (1998) (case in the district court was entirely an admiralty case which did not include a right to trial by jury); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 958, 986 (5th Cir. 1978) (plaintiff may preclude a defendant from invoking the right to a trial by jury by electing to proceed under Rule 9(h)); *T.N.T. Marine Service, Inc. Weaver Shipyards & Dry Docks, Inc.* 702 F.2d 585, 587-88 (5th Cir. 1983), *cert. denied*, 464 U.S. 847 (1983) (where a complaint contains a statement which identifies a claim as an admiralty or maritime claim, there is no right to a jury trial, even though diversity jurisdiction may exist). *But see Lockheed Martin Corp.*, 503 F.3d at 360 (insurer's declaratory judgment action identified as a non-jury admiralty claim did not affect insured's right to a jury trial on a breach of contract counterclaim); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995) (jury may decide all issues in a case involving both admiralty and law claims); *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1042 (8th Cir. 1983) ("Although there is no constitutional right to a jury trial in an admiralty case, neither is there a prohibition against jury trials in admiralty cases. Neither the seventh amendment, nor any statute of rule of procedure forbids jury trials."); *Wilmington Trust v. U.S. District Court for the Dis-*

trict Court of Hawaii, 934 F.2d 1026, 1031 (9th Cir. 1991), *cert. denied* 503 U.S. 966 (1992) ("Regardless of whether a claim is cognizable in admiralty, the right to a jury trial on such claim is preserved despite plaintiff's election to proceed in admiralty."). This has resulted in a significant erosion of the clarity and predictability that the members of AIMU depend on in providing insurance that is vital to maritime commerce. It is critical to the members of AIMU that the Court resolve this conflict.

The Decision Below Will Result In Uncertainty As To Awards of Damages In The Maritime Context And Consequent Undue Burdens On Marine Insurers And Their Insureds.

The potential for juries to erode the uniformity and consistency of awards rendered in cases involving marine insurance imposes a considerable burden of uncertainty on the maritime industry and its insurers. From the perspective of AIMU's members, the potential consequence of the Fourth Circuit's decision is that marine insurers will be unable to establish accurate loss estimates, and they will therefore be compelled to increase premiums. These increased premiums will be passed on to insureds and, in turn, to the insureds' customers. This would have a significant adverse effect on maritime commerce.

The marine insurance industry relies on effective risk management and assessment in order to set premiums and terms of coverage. *See e.g., Bender Shipbuilding & Repair Co. v. Brasiliero*,

874 F.2d 1551, 1557 (11th Cir. 1989) ("An insurance policy, regardless of its subject matter, is a contract between the insured and the insurer for coverage of risks. The insurer makes an assessment of the risks facing the insured, sets premiums consistent with the risks covered and supplies a written statement of coverage."). Although waterborne commerce entails risks, these risks can be managed when they are predictable. In the areas of maritime law and marine insurance, predictability and uniformity have traditionally been achieved by having cases heard by federal judges, who have unique experience in this area of law. *Larson v. Insurance Co. of North America,* 252 F. Supp. 458, 467 (W.D. Wash. 1965), *aff'd,* 362 F.2d 261 (9th Cir. 1966) (quoting 44 C.J.S. *Insurance* § 289, pp. 1136-1138, n. 11); *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 278 F. 770 (S.D.N.Y. 1922), *aff'd,* 282 F. 976 (2d Cir. 1922), *aff'd,* 263 U.S. 487 (1924) ("The interpretation of a marine insurance policy is not a question of morals or of public policy, and the important thing is to secure uniformity of an interpretation in a commercial world embracing more than one continent and more than one ocean."). Permitting juries in some jurisdictions (but not others) to decide issues of marine insurance threatens to upset the uniformity that is vital to maritime commerce and its insurers, and to impede marine insurers from accurately and effectively engaging in risk management. *Cf. Markman v. Westview Instruments*, 517 U.S. 370, 388 (1996) (holding in a patent case that "[t]he construction of written instruments is one of those things that judges often do and are likely to do better than jurors

unburdened by training in exegesis") The *Markman* court went on to note that "[u]niformity would, however, be ill served by submitting issues of document construction to juries." *Id.* at 391.

The Court below has ignored fundamental objectives of federal maritime law: uniformity, predictability and avoidance of undue burdens on maritime commerce. Federal maritime law, which governs issues arising under marine insurance policies, provides limited liability for shipowners and fair and reasonable compensation for maritime claims, while promoting settlement and judicial economy. *See, e.g., Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983) ("In sum, comparative fault has long been the accepted risk-allocating principle under the maritime law, a conceptual body whose cardinal mark is uniformity. These values of uniformity, with their companion quality of predictability, a prized value in the extensive underwriting of marine risks, are best preserved by declining to recognize a new and distinct doctrine without assuring the completeness of its fit."); *In re M.V. Floreana*, 37 F. Supp. 2d 853, 854 (S.D. Tex. 1999) ("Forgetting that maritime limitation of liability is a principle of American law that parallels international law leads to idiosyncratic judgments that undermine the predictability and reciprocity of American maritime law."). Each of these goals may be undermined by the submission of maritime claims to juries, who are generally unfamiliar with marine insurance policies and the law governing those policies. Lay juries lack the depth of knowledge regarding marine insurance that is possessed by federal judges.

Unique concepts of marine insurance, such as *uberrimae fidei* or "utmost good faith", are well known to federal judges but not to juries.

Indeed, marine insurance is traditionally exempt from many of the rules and regulations that apply to other lines of insurance. *Acadia Ins. Co. v. McNeil*, 116 F.3d 599, 604 (1st Cir. 1997) ("Consistent with this approach, the New Hampshire Insurance Code affords idiosyncratic treatment to ocean marine insurance in various ways; for example, it eschews the usual tax on premiums via-a-vis ocean marine insurance (instead substituting a special tax on underwriting profits), places ocean marine insurance outside the New Hampshire Insurance Guaranty Association, and exempts ocean marine insurance from certain underwriting strictures and from rate regulation."); *St. Paul Ins. Co. v. Great Lakes Turnings, Ltd.*, 829 F. Supp. 982, 985 (N.D. Ill. 1993) ("The states generally exempt marine insurance from the kind of licensing and rate regulations that apply to other types of insurance."). If the Fourth Circuit's decision is allowed to stand, there is a substantial risk that juries will import the more familiar concepts from these rules and regulations into the marine insurance context. This would make the law relating to marine insurance more unpredictable, thus punishing maritime commerce rather than protecting it, expanding the potential liability of participants in the maritime industry rather than limiting it. *Jackson v. Travelers Ins. Co.*, 26 F. Supp. 2d 1153, 1162 n.13 (S.D. Iowa 1998) ("The liability of insurers is relevant because the unpredictable and extreme awards that juries

return against insurers presumably result in higher premiums for Nebraska employers. For example, in 1993, California juries awarded verdicts of $425,600,000 and $89,320,000 against insurers in bad faith cases, and in Texas a verdict was returned for $102,170,000 against an insurer that denied a $20,000 underinsured motorist claim.") (citation omitted).

In turn, efficient and effective underwriting of marine insurance becomes extremely difficult, if not impossible, when uniform and consistent results cannot be expected throughout the courts of the United States. Marine insurers have always expected that they can seek redress before a federal judge, and such judges have historically, and efficiently, set standards to resolve disputes and determine awards in cases involving marine insurance. Risks cannot be efficiently or effectively underwritten if it is unclear whether a judge or jury will address issues arising under marine insurance policies, or if this distinction depends upon which Circuit a case is filed in.

Marine insurers therefore need to know whether judges or juries will be deciding cases involving their insurance policies. Jury awards are far less predictable than awards rendered by federal judges, and the greater risk associated with unpredictable jury awards would require marine insurers to charge higher premiums, or perhaps refuse to underwrite certain coverages altogether. Thus, the decision below not only directly impacts the members of AIMU, but it will have an impact on the cost and availability of marine insurance coverages in the United

States. Those coverages are necessary for the participants in the maritime industry at large (and by their financiers), and thus the decision below, if not reversed, will have a chilling effect on maritime commerce.

The uncertainty and unpredictability that would result from the Fourth Circuit's decision further impacts AIMU's members directly, because marine insurers often utilize declaratory judgment actions in order to expeditiously determine rights and liabilities under marine insurance policies. *Windsor Mt. Joy Mut. Ins. Co. v. Johnson*, 264 F. Supp. 2d 158, 164 (D.N.J. 2003) ("An insurer's action for a judgment declaring that it need not provide coverage under a policy 'is a normal and orderly procedure.' ") (citation omitted). The availability of declaratory judgments and the efficient and predictable results obtained thereby are a significant benefit to the entire marine insurance community. *Metropolitan Property & Casualty Co. v. Bernardo*, 1998 Conn. Super. Lexis 1299 (Conn. Super. Ct. 1998) ("However, the present declaratory judgment action is a speedier and more efficient way to determine whether [the insured] was covered under the [plaintiff's] policy at the time of the accident.") (citation omitted). Interjecting jury trials into this area would only undermine the effectiveness of the federal courts in deciding these issues. And again, allowing for different rights and different triers of fact in different Circuits results in a significant uncertainty in the area of marine insurance.

The ocean marine insurance industry, like the maritime industry as a whole, requires standard

and uniform rules as to liability. The judges of the federal courts have long been effective arbiters of disputes involving marine insurance. AIMU therefore implores this Court to grant National Casualty's petition for a writ of certiorari, and to clarify federal procedure with respect to the right to a jury trial. The petition should be granted so that this Court can articulate a uniform standard that both marine insurers and maritime industry participants in general can rely on in conducting commerce. National Casualty and other maritime industry participants, including the members of AIMU, need clear, simple and rational standards in order to best serve the needs of maritime commerce.

This case provides the Court with the opportunity to provide uniformity, certainty and predictability of risk for the marine insurance industry and the maritime industry at large.

CONCLUSION

For the foregoing reasons and as set forth in National Casualty's petition, the petition for a writ of certiorari should be granted.

Dated: February 21, 2008

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

No. 07-948

NATIONAL CASUALTY COMPANY,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONER

The Maritime Law Association of the United States (hereinafter, "MLA") respectfully submits the following *amicus curiae* brief in support of the petition of National Casualty Company ("National Casualty") for a writ of certiorari.[1]

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The MLA is a voluntary, nationwide bar association founded in 1899, with a membership of approximately 3,100 attorneys, judges, law professors, and other distinguished members of the maritime community. Its attorney members, most of whom are specialists in maritime law, represent virtually all maritime interests—shipowners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.[2] This Court has described the MLA as "an organization of experts

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Pursuant to this Court's Rule 37.2(a), *amicus curiae* states that petitioner and respondent received timely notice of the intent to file this brief and have each given written consent to the filing of this brief. Such written consent has been filed with the Clerk.

The MLA takes no position on the correctness or incorrectness of the opinion of which Petitioner seeks review. The MLA submits this brief merely to delineate the issues that it believes require this Court's decision and to argue in favor of review.

[2] The MLA has sponsored a wide range of maritime legislation and revisions thereto in its 108 years of existence, including the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315; the maritime portions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1603-1611; the Maritime Lien Acts of 1910 and 1920 and their 1988 amendments, *see* 46 U.S.C. §§ 31341-31343; the Act permitting appeals from interlocutory admiralty decrees, 28 U.S.C. § 1292(a)(3); the Public Vessels Act, 46 App. U.S.C. §§ 781-790; the Extension of Admiralty Jurisdiction Act, 46 App. U.S.C. § 740; and the Inland Rules Act, 33 U.S.C. §§ 2001-2038. See also, *Merchants Bank of Mobile v. Dredge* GENERAL G.L. GILLESPIE, 663 F.2d 1338, 1350, fn. 17 (5th Cir. 1991) ("*Merchants Bank*") [MLA "regularly participates in national and international proceedings concerning maritime treaties and conventions"].

in admiralty law" and "an expert body of maritime lawyers . . ."[3]

The purposes of the MLA[4] are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the *Comitè Maritime Internationale* and as an affiliated organization of the American Bar Association, and to act with other associations to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

It is the MLA's policy to involve itself as *amicus curiae* only when important issues of maritime law or practice are implicated and only when the effect of the Court's decision on maritime commerce or admiralty law may be substantial.[5] The MLA is interested

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[3] *Offshore Logistics v. Tallentire*, 477 U.S. 207, 223-24 (1986) ("*Offshore Logistics*").

[4] Admiralty courts have recognized the MLA's general interests and concerns, including the "growing risk that fundamental principles of maritime law are presently being inadvertently eroded." *Merchants Bank*, 663 F.2d at 1349, fn. 17.

[5] *E.g.*, *Exxon Shipping Co. v. Baker*, No. 07-219 (*cert granted* Oct. 29, 2007); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *United States v. Locke*, 529 U.S. 89 (2000); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1995); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Sisson v. Ruby*, 487 U.S. 358 (1990); *Offshore Logistics*, 477 U.S. 207; and *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

in this case because the issue substantially affects admiralty practice and procedure, and the result of the case will impact a sizeable portion of its nationwide membership.

First, denying the petition for certiorari would adversely affect uniformity of maritime law and practice. There exists a split of opinion among the circuits as to whether a compulsory counterclaimant can demand a jury trial in pursuing a legal counterclaim when a plaintiff has elected to proceed in admiralty, without a jury, pursuant to Rule[6] 9(h).[7] This Court's ruling is necessary to make the law uniform.

Second, denying certiorari may affect traditional admiralty jurisdiction. Controversies arising from marine insurance contracts, such as the one at bar, are at the core of district courts' admiralty jurisdiction.[8] While admiralty jurisdiction does not preclude other bases of jurisdiction in *in personam* actions,[9] when more than one basis exists, a suitor has long had the election to determine whether to proceed under admiralty jurisdiction, and thereby avail itself

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[6] All citations to herein to a "Rule" refer to the Federal Rules of Civil Procedure.

[7] *E.g.*, *Concordia Company, Inc. v. Panek*, 115 F.3d 67, 71 (1st Cir. 1997) ("*Concordia*") [recognizing "split of authority on this issue" of whether a plaintiff's election to proceed in admiralty under Rule 9(h) "characterizes the whole action regardless of any Seventh Amendment right the counterclaimant may have to a jury trial"].

[8] 28 U.S.C. § 1333; *Insurance Co. v. Dunham*, 78 U.S. (11 Wall) 1, 31-2 (1870).

[9] 28 U.S.C. § 1333(1); *Pryor v. American President Lines*, 520 F.2d 974, 976-77 (4th Cir. 1975).

of the special benefits of admiralty procedures and remedies.[10]

Third, the outcome of this case would affect the meaning of law originally advanced by the MLA. The MLA played a leading role in the 1966 merger of civil and admiralty rules of procedure.[11] The MLA's Committee on Practice and Procedure worked closely with the Advisory Committee, which included several senior members of the MLA. As a result, the MLA played a significant role in preserving essential features of traditional admiralty practice in the unified rules.

For the foregoing reasons, the MLA's nationwide membership of attorneys, judges, law professors, and members of the maritime community have a special interest in this Court issuing a writ of certiorari to the Fourth Circuit Court of Appeals.

SUMMARY OF ARGUMENT OF *AMICUS CURIAE*

There are compelling reasons to grant National Casualty's petition for a writ of certiorari.[12] First, the issue on which National Casualty seeks review is important[13] because it implicates constitutional concerns, construction of federal statutes and rules of procedure, and questions of federal jurisdiction.

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[10] *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249, 1252 (5th Cir. 1975).

[11] THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, HISTORY, PURPOSES, ORGANIZATION & ACTIVITIES, §II, p. 5 (2006).

[12] SUP. CT. RULE, 10.

[13] SUP. CT. RULE, 10(a) and (c).

Second, the issue has not been settled by this Court.[14] Though the Fourth Circuit analogized this case to two prior Supreme Court opinions,[15] neither of those cases presented facts similar to the facts of this case.

Third, the issue should be settled by this Court.[16] Not only is this question constitutionally important, but it is particularly suitable for this Court to resolve it. Admiralty is uniquely federal[17] and national.[18] Therefore, procedural and substantive uniformity are essential. Compounding the matter, admiralty is predominantly judge-made law.[19] Therefore, this Court has a special authority and responsibility to address disputes in admiralty.[20]

Fourth, the Fourth Circuit's decision below is in conflict with decisions of other United States courts of appeals on the same important question.[21] The Fourth Circuit's opinion expressly recognizes an existing split of authority among the circuits: "In cases involving counterclaims or cross-claims that could proceed at law, *courts are divided* on the

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[14] SUP. CT. RULE, 10(c).

[15] *In re Lockheed Martin Corp.*, 503 F.3d 351, 356-57 & 359 (4th Cir. 2007), citing *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962) ("*Ellerman*") and *Beacon Theatres Inc. v. Westover*, 359 U.S. 500 (1959) ("*Beacon Theatres*").

[16] SUP. CT. RULE, 10(c) .

[17] U.S. CONST. art. III, § 2.

[18] *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874).

[19] *Id.* at 576.

[20] *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20-1 & fn. 12 (1963) ("*Fitzgerald*").

[21] SUP. CT. RULE, 10(c).

question of whether the plaintiff's Rule 9(h) admiralty designation prevents the defendant from obtaining a jury trial."[22] Other federal courts, both circuit and district, also recognize the split.[23]

ARGUMENT OF *AMICUS CURIAE*

I. PETITIONER NATIONAL CASUALTY PRESENTS AN IMPORTANT QUESTION

National Casualty presents a constitutionally important issue for this Court's decision:[24] whether a counterclaimant, by filing its counterclaim as a legal claim, can negate a declaratory relief plaintiff's election to proceed without a jury in admiralty. This implicates multiple constitutional and statutory provisions.

Article III, Section 2 of the United States Constitution vests the district court with jurisdiction over controversies both in admiralty and between diverse citizens. "[T]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction [and] to Controversies . . . between Citizens of different States . . ."[25] The Seventh Amendment preserves "the right of trial by jury" in "Suits at common law."[26] Historically, suits in admiralty were not "Suits at common law,"[27] but the line between law and admiralty is not always bright.

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[22] *In re Lockheed Martin Corp.*, 503 F.3d at 357 (italics added).

[23] *E.g.*, *Concordia*, 115 F.3d at 71.

[24] SUP. CT. RULE, 10(a) and (c).

[25] U.S. CONST. art. III, § 2, cl. 1.

[26] U.S. CONST. amend. VII.

[27] *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847).

"Many claims," including this one, "are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction."[28] On the one hand, pursuant to Article III, Section 2's authorization, Congress legislated that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between – (1) citizens of different states . . ."[29] In such diversity cases proceeding at law, the Seventh Amendment preserves the right to a jury trial.[30] On the other hand, Congress (indeed, the First Congress in 1789[31]) has also authorized the district courts to exercise "exclusive" jurisdiction in "[a]ny civil case of admiralty or maritime jurisdiction"[32] where again, absent contrary Congressional directive, there is no right to a jury. However, that same authorization of jurisdiction "sav[es] to suitors in all cases all other

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[28] Rule 9(h), 1966 Amendment Advisory Committee Notes, 39 F.R.D. 69, 75.

[29] 28 U.S.C. § 1332(a).

[30] "The authority and only authority" for the common law of a state "is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." *Erie Railroad Co. v. Tomkins*, 304 U.S. 64, 79 (1938); citing *Black & White Taxicab, etc., Co. v. Brown & Yellow Taxicab, etc., Co.*, 276 U.S. 518, 535 (1928) (Holmes, J., dissenting). However, "the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions." *Simler v. Conner*, 372 U.S. 221, 222 (1963).

[31] See *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 328-29 & fn. 9 (1955).

[32] 28 U.S.C. § 1333.

remedies to which they are otherwise entitled."[33] Thus, while the district court's admiralty jurisdiction is "exclusive,"[34] the statute[35] concurrently preserves common law "remedies" to suitors where the common law is competent to give them, such as cases where jurisdiction could be based on diversity in addition to admiralty.[36] In such cases, "remedies" include "all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved," including "[t]rial by jury."[37]

Procedurally, if legal and admiralty bases for jurisdiction both exist, the "saving to suitors" clause allows the plaintiff to determine whether to proceed in district court in admiralty, at law in state court, or at law in district court.[38] If the plaintiff chooses admiralty, the action is thereafter within the court's "exclusive" admiralty jurisdiction, notwithstanding the defendant's preference or the fact that, but for the election, the courts of law may also have had jurisdiction and a jury right would have attached through

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[33] 28 U.S.C. § 1333(1) (italics added).

[34] 28 U.S.C. § 1333; *The Hine*, 71 U.S. 555, 568-69 (1866).

[35] "Concurrent jurisdiction is statutory, not constitutional, based upon the saving to suitors clause in the statute." Thomas J. Schoenbaum, Admiralty and Maritime Law (Thompson-West, 2001), § 4-4, p. 173, fn. 4, col. 2.

[36] *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 123-24 (1924) ("*Red Cross Lines*") ["[b]y reason of the saving clause, state courts have jurisdiction *in personam*, concurrent with admiralty cases" though not in *in rem* actions].

[37] *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454-55 (2001); quoting *Red Cross Line*, 264 U.S. at 124.

[38] *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371-372 (1959).

the Seventh Amendment.[39] Before the 1966 unification of the rules of civil and admiralty procedure, the suitor made its election by filing on the law or admiralty "side" of the district court.[40] That distinction did not survive the merger, which gave birth to Rule 9(h), and from which a single form of action arose.[41] But because the legal and admiralty jurisdiction of the court can be concurrent, pursuant to its delegated authority (which has the force of statute[42]) and consistent with the saving to suitors clause,[43] the Supreme Court provided a bright line rule by allowing "the pleader" to designate a choice of jurisdiction in its pleading.[44] When the Fourth Circuit issued

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[39] *In re Lockheed Martin Corp.*, 503 F.3d at 357; quoting *Waring*, 46 U.S. at 460-61.

[40] Rule 9(h), 1966 Amendment Advisory Committee Notes, 39 F.R.D. at 75.

[41] 28 U.S.C. § 1331(1); Rule 9(h), 1966 Amendment Advisory Committee Notes, 39 F.R.D. at 75.

[42] The Federal Rules of Civil Procedure have the same authority and effect as congressionally enacted statutes. 28 U.S.C. §§ 2071 and 2072; *Republic Tobacco Co. v. N. Atlantic Trading Co., Inc.*, 481 F.3d 442, 448 (7th Cir. 2007) ["[w]here the Federal Rules conflict with a 'procedure provided in an earlier act of Congress,' the Federal Rules control"]; *Nordmeyer v. Sanzone*, 315 F.2d 780, 781-82 (6th Cir. 1963) ["[i]t is well settled that the Federal Rules of Civil Procedure have the force and effect of a federal statute"]; *Griffith Co. v. NLRB*, 545 F.2d 1194, 1197, fn. 3 (9th Cir. 1976) ["statutes are superseded by conflicting federal rules"].

[43] 28 U.S.C. § 1333(1).

[44] Rule 9(h), 1966 Amendment Advisory Committee Notes, 39 F.R.D. at 75-76.

its writ of mandamus in this action, Rule 9(h) then provided, in pertinent part:[45]

> **Admiralty and Maritime Claims**. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), and 82, and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Rule 38(e), in turn, at that time stated that "[t]hese rules shall not be construed to create a right to trial by jury on the issues in an admiralty or maritime claim within the meaning of Rule 9(h)." It now states that "[t]hese rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h)," i.e., when the suitor has elected to proceed in admiralty.

In issuing mandamus, the Fourth Circuit[46] emphasized the effects of the 1948 Declaratory Judgment

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[45] Effective December 1, 2007 (after the Fourth Circuit issued its writ of mandate in the present case), Rule 9(h) was amended, though "[t]hese changes are intended to be stylistic only." It now reads, in pertinent part: "**Admiralty and Maritime Claims**. (1) How Designated. If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions."

[46] *In re Lockheed Martin Corp.*, 503 F.3d at 359.

Act.[47] The Declaratory Judgment Act provides, in pertinent part, that:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

Further to that scheme, Rule 57 then provided,[48] in pertinent part, "[t]he procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39."

II. THE MATTER HAS NOT BEEN SETTLED BY THIS COURT

Despite the existence of an actual controversy and although the Declaratory Judgment Act gives the district court discretion to decline to hear a controversy on which the suitor seeks no relief but a declaration,[49] the Fourth Circuit held that allowing the declaratory relief plaintiff's election to determine the jurisdiction of the court, pursuant to Rule 9(h),

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[47] 28 U.S.C. § 2201.

[48] Effective December 1, 2007, Rule 57 now provides, in pertinent part: "These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. Rules 38 and 39 govern a demand for a jury trial..."

[49] District courts have discretion to refuse adjudication of declaratory relief actions (*A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 342 (1961)) regardless of the basis or existence of subject-matter jurisdiction. *United States v. City of Las Cruces*, 289 F.3d 1170, 1180-81 (10th Cir. 2002).

and therefore the availability of a jury trial pursuant to Rule 38(e), amounted to a "race to the courthouse door." This result, according to the Fourth Circuit, is undesirable because the declaratory relief defendant would have no choice but to pursue its compulsory counterclaims without a jury[50] when it otherwise would have had the suitor's election.[51]

The Fourth Circuit[52] appears to have found to be dispositive the Supreme Court's decisions in *Ellerman*[53] and *Beacon Theatres*.[54] But neither of those cases involved the facts presented here. In *Ellerman*, a longshoreman employed by a stevedore was injured while unloading a ship, and sued the ship's owners.[55] Like this case, both admiralty[56] and diversity jurisdiction existed.[57] Unlike this case, the suitor brought the action on the law side of the court, not the admiralty side, and demanded a jury trial.[58]

At trial, the jury found that the shipowners were liable and that the stevedore was not at fault. The court of appeals affirmed the jury's verdict against the owners but reversed the judgment in favor of the stevedore, finding that it was negligent as a matter of law. The Supreme Court held that the court of appeals violated the Seventh Amendment's proscrip-

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[50] Rule 13(a).

[51] *In re Lockheed Martin Corp.*, 503 F.3d at 359.

[52] *Ibid.*

[53] *Ellerman*, 369 U.S. 355.

[54] *Beacon Theatres*, 359 U.S. 500.

[55] *Ellerman*, 369 U.S. at 356-57.

[56] U.S. CONST. art. III, § 2; 28 U.S.C. § 1333(1).

[57] U.S. CONST. art. III, § 2; 28 U.S.C. § 1332(a).

[58] *Ellerman*, 369 U.S. at 357.

tion against re-examining factual findings by a jury in cases at common law.[59]

"In [the Fourth Circuit's] view, *Ellerman* makes it clear that the Seventh Amendment applies to admiralty claims that are tried 'at law' by way of the saving-to-suitors clause." But the Fourth Circuit also correctly recognized "an important difference . . . between *Ellerman* and the case at bar. Whereas in *Ellerman* the plaintiff elected to proceed at law, the plaintiff here elected to proceed in admiralty."[60] Ultimately, however, the Fourth Circuit "believe[d] . . . that this factual difference is [ir]relevant."

Lockheed Martin argued, and the Fourth Circuit agreed, that Lockheed Martin was the true "suitor," not National Casualty, since National Casualty merely sought declaratory relief.[61] Lockheed Martin and the Fourth Circuit trivialize, as a "race to the courthouse door," National Casualty's election to avail itself of the Declaratory Judgment Act,[62] although declaratory judgment actions often resolve all issues in marine insurance disputes.[63]

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[59] *Id.* at 358.

[60] *In re Lockheed Martin Corp.*, 503 F.3d at 358-59

[61] *Ibid.*

[62] 28 U.S.C. § 2201; Rule 57.

[63] See, e.g., *Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc.*, – F.3d – (9th Cir. 2008), 2008 WL 351688, at *2 [summary judgment for plaintiff insurers in declaratory relief action affirmed and insurers entitled to void insurance policy for insured vessel owner's failure to disclose material information]; *Cigna Property and Casualty Ins. Co. v. Polaris Pictures Corp.*, 149 F.3d 412, 419 (9th Cir. 1998) ("*Cigna Property*") [defendant insureds not entitled to jury trial on counterclaims at law in marine insurance case; plaintiff insurer's equitable rescission claims, tried to the court, resolved all issues].

The Fourth Circuit below said that this Court's ruling in *Beacon Theatres* commanded a jury trial. There, the plaintiff sought a declaration that it was not violating the Sherman Antitrust and Clayton Acts, characterizing its claims as equitable. The defendant counterclaimed and demanded a jury trial. The Fourth Circuit quoted part of the *Beacon Theatres* opinion:[64]

> [W]hile allowing prospective defendants to sue to establish their nonliability, [the Declaratory Judgment Act] specifically preserves the right to jury trial for both parties. It follows that if Beacon would have been entitled to a jury trial in a . . . suit against Fox it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first. Since the right to trial by jury applies to . . . suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade, the Sherman and Clayton Act issues on which Fox sought a declaration were essentially jury questions.

An obvious distinction between this case and *Beacon Theatres* is that the latter was not an admiralty case and involved no Rule 9(h) election. The Fourth Circuit concluded that "[t]here is nothing in *Beacon Theatres* that suggests that this inquiry does not apply when the declaratory judgment action is brought in an admiralty case."[65] The contrary position is "the right to trial by jury," unlike in antitrust cases, is not

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[64] *In re Lockheed Martin Corp.*, 503 F.3d at 358-59; quoting *Beacon Theatres*, 359 U.S. at 504.

[65] *In re Lockheed Martin Corp.*, 503 F.3d at 359.

"an essential part of the congressional [or constitutional] plan" for admiralty litigation.[66]

Further, the result in *Beacon Theatres* appears to have turned on a statutory rather than a constitutional analysis.[67] The *Beacon Theatres* Court was "of the opinion that, under the Declaratory Judgment Act and the Federal Rules of Civil Procedure, neither [of the plaintiff's] claim[s] can justify denying [defendant] a trial by jury of all the issues in the antitrust controversy."[68] "[T]he Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 . . . and Fed. Rules Civ. Pro. 57 . . . while allowing prospective defendants to sue to establish their nonliability, specifically preserves the right to jury trial for both parties."[69]

The MLA suggests, without taking a substantive position, that there is a contrary view, and this Court should decide the issue. Rule 57 states that a jury is available in declaratory relief actions in the manner

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[66] *Waring*, 46 U.S. at 460.

[67] Only after determining that the Declaratory Judgment Act and Rules of Civil Procedure protected defendant's right to a jury trial in antitrust cases brought in equity (not admiralty) did the Court address the Seventh Amendment protection of jury trials. *Beacon Theatres*, 359 U.S. at 509-11. It is a fundamental doctrine of jurisprudence that constitutional grounds should not be reached when a narrower, statutory ground will resolve a case. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 457 & fn. 1 (1985) (Marshall, J., dissenting). Thus, the constitutional dimension of *Beacon Theatres* appears to be dicta, and is therefore not compelling authority. *Tyler v. Cain*, 533 U.S. 656, 663, fn. 4 (2001) [dicta, language unnecessary to reach the court's result, is not binding]; see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

[68] *Beacon Theatres*, 359 U.S. at 506.

[69] *Id.* at 504.

provided by Rule 38. Rule 38(e), in turn, states that the rules do not create a "right to a trial by jury of the issues in an admiralty claim within the meaning of Rule 9(h)." Rule 9(h) leaves it to the "pleader." This Court was aware of the Declaratory Judgment Act, including Rule 57, when it enacted Rule 9(h).[70] Thus, the fact that *Beacon Theatres* was not maritime distinguishes it from the facts underlying this case, which was brought in admiralty. Thus, the question presented here is an open one.[71]

III. THE MATTER SHOULD BE SETTLED BY THIS COURT

This is a fundamentally important matter due to its constitutional, jurisdictional, statutory, and procedural implications. For that same reason, it should be settled by this Court.[72] But even apart from its fundamental importance, there are other reasons to grant certiorari.

This Court has a unique authority and responsibility to resolve admiralty disputes.[73] The Constitution singles out admiralty as a matter of national importance[74] that is uniquely within the federal government's judicial purview.[75] But with only limited

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[70] The Declaratory Judgment Act, including Rule 57, predates unification, which occurred in 1966.

[71] Cf. *In re Lockheed Martin Corp.*, 503 F.3d at 359.

[72] SUP. CT. RULE, 10(c).

[73] *Fitzgerald.*, 374 U.S. at 20-1 & fn. 12.

[74] U.S. CONST, art. III, § 2; *The Lottawanna*, 88 U.S. at 575.

[75] U.S. CONST. art. III, § 2. While state courts may have concurrent legal jurisdiction over some cases where admiralty jurisdiction exists, 28 U.S.C. § 1333(1), they still must apply

exceptions, Congress has left it to the courts to define the law and practice of admiralty.[76] Therefore, admiralty tribunals below as well as the nationwide admiralty bar seek this Court's guidance, especially on such fundamental matters as the scope of concurrent jurisdiction and the availability *vel non* of a jury trial, to resolve divergences among the lower courts.

Admiralty abhors non-uniformity. It is particularly important for this Court to resolve a circuit split, since it creates an undesirable uncertainty for maritime actors and the proctors who advise them. Further, the circuit split encourages forum shopping among the circuits.[77]

IV. THERE IS A CLEAR CONFLICT OF OPINION AMONG THE CIRCUIT COURTS OF APPEALS AND AMONG THE DISTRICT COURTS

The Fourth Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]"[78] The Fourth Circuit itself recognized the split: "In cases involving counterclaims or cross-claims that could proceed at law, *courts are divided* on the ques-

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federal maritime law pursuant to the "reverse-*Erie* doctrine." *Offshore Logistics*, 477 U.S. at 222-23.

[76] *The Lottawanna*, 88 U.S. at 576; *Fitzgerald.*, 374 U.S. at 20-21 & fn. 12.

[77] *Silver Star Enterprises, Inc. v. SARAMACCA MV*, 82 F.3d 666, 669-70 (5th Cir. 1996) ["A decision by this circuit creating a circuit split and permitting the affixation of maritime liens for bulk container lessors would spawn uncertainty, compounded by forum-shopping and extravagant lien claims"].

[78] SUP. CT. RULES, rule 10(a).

tion of whether the plaintiff's Rule 9(h) admiralty designation prevents the defendant from obtaining a jury trial."[79] As it now stands, in maritime controversies arising from the Fourth, Eighth, and Ninth circuits, legal counterclaimants can avail themselves of a jury trial despite a plaintiff's Rule 9(h) admiralty designation. In the Fifth Circuit, the counterclaimant's legal claim does not vitiate the plaintiff's election to proceed in admiralty. Another circuit, the First, has recognized the conflict, but navigated its way around it.[80] Many district courts have taken sides, too.

After acknowledging the circuit split, the Fourth Circuit sided with the Eighth and Ninth circuits in their respective opinions[81] *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*[82] ("*Koch Fuels*") and *Wilmington Trust v. District Court for the District of Hawaii*[83] ("*Wilmington Trust*"). In *Koch Fuels*, plaintiff filed an *in rem* action for possession of a cargo of fuel and elected admiralty jurisdiction pursuant to Rule 9(h).[84] An intervenor filed a legal cross-

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[79] *In re Lockheed Martin Corp.*, 503 F.3d at 357 (italics added).

[80] *Concordia*, 115 F.3d at 71 ["declin[ing] to resolve the difficult issue" because counterclaimant failed to properly invoke option to proceed in law, rather than admiralty].

[81] *In re Lockheed Martin Corp.*, 503 F.3d at 357-58.

[82] 704 F.2d 1038 (8th Cir. 1983).

[83] 934 F.2d 1026 (9th Cir. 1991); *c.f. Cigna Property*, 159 F.3d at 415 & 418-19; *cert denied*, 528 U.S. 815 [plaintiff insurer's admiralty claim for rescission of marine insurance contract allowed to proceed as bench trial, despite defendant/counterclaimant insured's request for jury trial on legal counterclaims for breach of contract and bad faith]; and *McCrary v. Seatrain Lines, Inc.*, 469 F.2d 666, 668 (9th Cir. 1972).

[84] *Koch Fuels*, 704 F.2d at 1039.

claim against plaintiff for breach of a charterparty agreement and successfully moved to sever its legal cross-claim from the admiralty action. The legal action was tried to a jury first. The court then tried the admiralty action. On plaintiff's appeal, the Eighth Circuit found no abuse of discretion in severing the trials and allowing the intervenor to try its claims to a jury.

In *Wilmington Trust*, a preferred ship mortgagor brought an *in rem* admiralty action against a ship.[85] A secondary mortgagor intervened, filing its own *in rem* action against the ship and legal and equitable counterclaims against the plaintiff.[86] The Ninth Circuit held that the intervening counterclaimant could, by filing an *in personam* legal counterclaim, vitiate the plaintiff's election to proceed in admiralty without a jury in its *in rem* claim.[87]

Some districts courts are aligned with the view of the Fourth, Eighth, and Ninth circuits. *See e.g.*, *Sphere Drake Ins. PLC v. J. Shree Corp.*, 184 F.R.D. 258, 261 (S.D.N.Y. 1999); *Reliance Nat'l Ins. Co. (Eurpose Ltd. v. Hanover*, 222 F.Supp.2d 110, 115-16 (D. Mass. 2002); *Progressive Northern Ins. Co. v. Bachman*, 314 F.Supp.2d 820, 833 (W.D. Wis. 2004); and *Canal Barge Co. v. Commonwealth Edison Co.*, 2002 WL 206054 at 3-4 (N.D. Ill. 2002).

The Fifth Circuit is probably the largest of the circuits in terms of admiralty and maritime litigation. It,[88] contrary to the Fourth, Eighth, and Ninth

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[85] *Wilmington Trust*, 934 F.2d at 1027.

[86] *Id.* at 1027-28.

[87] *Id.* at 1031-32.

[88] See, *infra*, footnotes 90 and 91.

circuits, has "held that the plaintiff's Rule 9(h) election to proceed under admiralty law governs the entire proceeding and precludes the defendant's right to a jury trial which may otherwise exist."[89] In *Harrison v. Flota Mercante Grancolombiana, S.A.*, the Fifth Circuit held that a third-party defendant's demand for a jury trial did not "emasculate" the plaintiff's Rule 9(h) election to proceed in admiralty without a jury.[90] Similarly, in *Becker v. Tidewater*,[91] the Fifth Circuit rejected defendant's contention that its demand for a jury trial on the basis of diversity trumped plaintiff's Rule 9(h) admiralty election.

District courts adhering to this view (excluding, for the sake of brevity, those mentioned in National Casualty's Petition for Writ of Certiorari, at pp. 14-15) include: *Norwalk Cove*, 100 F.Supp.2d at 114; *Matter of Armatur*, 710 F.Supp. 404, 405, fn. 4 (D. Puerto Rico 1989); *Underwriters Subscribing to Certif. of Ins. No. 98B1/800 v. On the Loose Travel, Inc.*, 1999 A.M.C. 1742, 1743 (S.D. Fla. 1999); *Hails v. Atlantic Richfield Co.*, 595 F.Supp. 948, 951-52 (W.D. La. 1984); and *Alaska Barite Co. v. Freighters, Inc.*, 54 F.R.D. 192, 195 (N.D. Cal. 1972).

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[89] *ING Groep, N.V. v. Stegall*, 2004 A.M.C. 2992, 2995 (D. Colo. 2004); see also *Norwalk Cove Marina, Inc. v. S/V ODYSSEUS*, 100 F.Supp.2d 113, 114 (D. Conn. 2000) ("*Norwalk Cove*") ["majority of courts hold that the plaintiff's electing to sue in admiralty has the right to determine the character of the action, which should not be disturbed by the defendant's counterclaims"].

[90] 577 F.2d 968 (5th Cir. 1978).

[91] 405 F.3d 257, 259 (5th Cir. 2005); see also *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1487 (5th Cir. 1992) ["the Supreme Court cases do not require a jury trial as an element of a 'saving to suitors' remedy"].

There is an unresolved conflict among the circuit and district courts, to the detriment of uniformity and the prejudice of members of the maritime industry and admiralty lawyers who advise them.

CONCLUSION

National Casualty presents an important issue, which this Court has not yet decided, but should. The issue has created an undesirable conflict in the federal circuits and district courts that can only reasonably be resolved by this Court. Therefore, the MLA, on behalf of its membership of admiralty lawyers, judges, academics, and industry actors, respectfully urges this Court to grant National Casualty's petition for a writ of certiorari.

Respectfully submitted,

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